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Striking a balance: the need for further reform of the law relating to industrial action

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Executive summary

- A ‘right to strike’ has been widely recognised as a fundamental element of stable collective bargaining. Industrial action is one of the essential means available to employees to promote and protect their economic and social interests and resolve industrial disputes. Employers may also use industrial action (for example through lockouts).
- Legislative frameworks have long been recognised internationally as having an important role to play in equalising power bases and promoting stable bargaining by establishing the ‘rules for the game’. A defined right to strike forms an important part of those rules.
- In defining the rules of the game, the International Labour Organisation (ILO) attempts to ensure that the right of parties to take industrial action is balanced against other fundamental rights of workers, employers and the public—such as the freedom of non-strikers to work and the right to protection of property and personal safety. This is sometimes misunderstood by governments which, in attempting to protect the ‘public interest’, impose constraints that effectively limit any successful industrial action and thereby, impair the important role of industrial action in collective bargaining.

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- Since the introduction in Australia of the concept of ‘protected’ industrial action by the Keating Government in 1993, successive waves of reform by the Howard Government in 1996 and 2005 severely constrained the right to take industrial action. They did this by limiting the scope for protected action, imposing difficult procedural requirements on its access and ensuring that all unprotected action is regarded as unlawful and subject to an array of remedies.
- The ILO and a number of Australian academic and other commentators have criticised the Work Choices reforms for tipping the balance of power too far towards employer interests—undermining the important role of the right to strike as a fundamental element of stable collective bargaining.
- Despite suggestions that further reform of the right to strike will be limited, this paper argues that a thorough review of relevant legislative provisions is required. It suggests that if such a review is undertaken it must give prime consideration to: the requirements of stable and voluntary collective bargaining; the need to strike a fair balance between the interests of workers, employers and the public; and the need to avoid unnecessary regulatory burden and complexity with its associated costs for organisations and the community. Consideration should also be given to Australia’s obligations under international conventions and the guidance provided by the principles and decisions of the ILO’s supervisory bodies.
- The paper notes concerns that any reduction of constraints on industrial action will see an ‘explosion’ of such action, but suggests that these concerns require critical consideration in light of the range of economic, social, cultural and structural changes which have seen industrial action fall to historically low levels.

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Introduction

There have been fundamental changes in the institutions and processes of Australian industrial relations over the last two decades. In particular, there has been a significant shift from a system dominated by conciliation and arbitration, in which bargaining played a subordinate role, towards a more decentralised system, in which bargaining predominates. These changes have been accompanied by considerable political, academic and social debate. Much of this debate has focused on whether the current framework is ‘fair’ in the protections it offers employees, or whether it is ‘unfairly’ weighted in favour of employers. Within this debate, considerable attention has focused on the role of awards and individual bargaining. A continued role for collective bargaining, at least at the level of the workplace and enterprise, has not been seriously questioned—being supported by all major political parties, employer associations and employee organisations. However, limited attention has been paid to the necessary requirements of stable collective bargaining systems.

A ‘right to strike’ (or to take industrial action) has been widely recognised as a fundamental element of voluntary collective bargaining. Industrial action is one of the essential means available to employees to promote and protect their economic and social interests. An ability to take industrial action is consistent with the parties taking responsibility for their industrial outcomes and an important means of overcoming a bargaining impasse. It may also be considered a necessary corollary of a healthy collective bargaining system and indeed, a healthy democracy.

Yet few, if any, industrial relations systems establish an **absolute** right to strike and relevant international covenants and conventions recognise the need for limitations on industrial action.

Since the introduction of the concept of ‘protected’ industrial action by the Keating Labor Government in 1993, successive waves of reform by the Howard Government in 1996 and 2005 have severely constrained the right to take industrial action. This occurred by limiting the scope for protected action, imposing difficult procedural requirements on its access and ensuring that all unprotected action is regarded as unlawful and subject to an array of remedies. While the Rudd Government has proposed further reform of the industrial relations legislative framework to encourage collective bargaining, ALP policy suggests that ‘clear, tough rules’ will apply to protected industrial action and certain other features of current arrangements will be retained.² In that context, this paper examines:

- the benefits of collective bargaining
- the role of a right to strike in voluntary collective bargaining systems
- recognition of the importance of a right to strike by relevant international organisations—and of the need for limitations on that right
- the development of a right to take protected industrial action in Australia

2. K. Rudd and J. Gillard, Australian Labor Party, *Forward with fairness: Labor’s plan for fairer and more productive workplaces*, April 2007 and K. Rudd and J. Gillard, Australian Labor Party, *Forward with fairness: Policy implementation plan*, August 2007.

- the nature of constraints which were imposed on the right to take industrial action in 1996 and 2005
- the need for further reform of the law relating to industrial action—with particular reference to concerns expressed by the ILO and the mandatory secret ballot requirements.

The paper focuses on the background to, and provisions of the *Workplace Relations Act 1996* relating to industrial action. It does not deal with the special arrangements applying to the building and construction industry which were established under the *Building and Construction Industry Improvement Act 2005*.

To assist the reader, a glossary of terms is provided at [Appendix A](#).

The benefits of bargaining

To understand approaches to handling industrial disputes within a collective bargaining framework, it is useful to distinguish between disputes of ‘interest’ and disputes over ‘rights’. Interest disputes concern the making of a new agreement, or changes to an existing agreement in relation to a matter not covered by the agreement. They may be distinguished from rights disputes which arise out of the interpretation of the provisions of an existing agreement that establishes employee ‘rights’ for the term of the agreement.

A right to strike generally arises in relation to the resolution of interest disputes. Many bargaining systems recognise that grievance or dispute resolution procedures (for example, involving a stepped process of discussion, conciliation or mediation, perhaps ending with arbitration) are appropriate to the resolution of rights disputes arising during the term of an agreement. The inclusion of such provisions within agreements can help to ensure that grievances are amicably resolved as quickly as possible and at the lowest possible level, without the need to resort to industrial action. This approach is consistent with the philosophy that employers, employees and their representatives should take responsibility for determining mutually beneficial terms and conditions of employment to apply in their workplaces and should adhere to those settlements during the life of their agreement.³

During the 1970s, much of the academic debate about industrial relations in Australia focused on the relative merits of arbitration and collective bargaining as alternative means of resolving interest disputes over the terms and conditions of employment. John Niland overviewed the case for collective bargaining and argued that features of the dynamics of bargaining gave it many advantages over arbitration. He explained that:

Under bargaining ... the claims are carefully adjusted so that the respective positions of the parties progressively become more realistic. This means that the gap between the final settlement point and the last known position of the union will be smaller.

3. Note that this general philosophy does not preclude the parties from specifying in their agreement that certain matters may be the subject of further negotiation during the term of the agreement. Alternatively, they may include a provision that ‘no further claims’ will be considered during the life of the agreement.

... [bargaining] tends to encourage a trade-off mentality not evident under arbitration. As each party is called on to make unplanned concessions, it is forced to develop specific priorities ... Bargaining not only enables each party to better understand the other side's true position, it encourages each side to a better understanding of its own position.⁴

For these reasons, Niland argued that bargaining was more likely than arbitration to facilitate genuine attitudinal change, bring about a resolution of a dispute and encourage commitment to the settlement. Other commentators have made similar points, noting that dispute settlements which are imposed on the employers and employees by external third parties are more likely to leave bad feelings and unresolved issues, which can undermine relationships and commitment to outcomes.⁵

Bargaining has also been recognised as being capable of redressing the fact that in some workplaces inefficient work practices (sometimes called restrictive work practices) may develop which management is unable to change without the consent and cooperation of employees. Workplace bargaining has been recognised as being an appropriate process to influence such changes, although 'productivity arbitration' has also played a role in this regard in some industries.⁶ As Mark Woden has noted:

... enterprise-based bargaining provides an opportunity for employers to trade-off wage increases for changes in work practices, thereby potentially leaving both individual workers and firms better off.⁷

Bargaining at the level of the workplace has advantages over unilateral management action or arbitration in assisting workplace reform and productivity growth. Bargaining provides an effective mechanism for tapping the potential and knowledge of employees, who often have valuable ideas about how to improve workplace performance. It provides a means of ensuring that those at the workplace take responsibility for developing their own solutions to emerging problems and issues, without relying on parties external to the workplace. And, it thereby encourages greater involvement in, and commitment to the implementation of change as a number of commentators have observed, for example:

... enterprise bargaining may have a sustained impact on productivity by affecting the long-run rate of productivity growth. This might arise if enterprise bargaining is able to promote

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4. J. Niland, *Collective bargaining and compulsory arbitration in Australia*, New South Wales University Press, Kensington, 1978, pp. 36–38.
 5. For example, Task Force to Review Part I of the Canadian Labour Code, *Seeking a Balance: Review of the Canada Labour Code Part I*, 1995, Chapter 1, http://www110.hrdc.gc.ca/sfmc_fmcs/lcctr_tclcr/ondex_e.html, accessed 9 May 2008.
 6. *ibid.*; R. McKersie and L. Hunter, *Pay, productivity and collective bargaining*, Macmillan, London, 1973, pp. 18 and 42; S. Dowrick, *Wage bargaining systems and productivity growth in OECD Countries*, EPAC Background Paper No 26, AGPS, Canberra, 1993. See J. Romeyn, 'Centralised and specialist tribunals: The influence of structure on arbitral decision-making in Australia', *Industrial Relations Research Centre Monograph Series*, University of New South Wales, Kensington, September 1982, pp. 54–57 in relation to productivity arbitration and the coal mining industry.
 7. M. Wooden, *The transformation of Australian industrial relations*, Federation Press, Sydney, 2000, p. 151.

more cooperative relations in the workplace, thereby potentially encouraging and facilitating innovation, and thus enabling a shift outwards in the production function.⁸

and

Collective bargained solutions often involve change. Change works best when both sides agree to the future direction. That is the reason why collective bargaining is so appropriate to organisations undergoing change. An imposed change can be resisted and undermined in subtle but corrosive ways by those who feel that change was imposed without their consent.⁹

It should be noted, however, that the hypothesis that workplace and enterprise bargaining is beneficial to productivity improvement has not been proven conclusively. Examining the evidence in 2000, Wooden found that:

On balance, while the case is certainly not proven, there does appear to be enough evidence to suggest that enterprise bargaining is associated with improved performance at a sufficient number of workplaces to have made a noticeable difference to aggregate productivity.¹⁰

More recent examinations of the literature undertaken by the state and territory governments led them to argue in 2005 that the ‘recent history of Australia establishes a clear link between collective bargaining and productivity gains.’¹¹ However, in their submission the state and territory governments conceded that:

Across a broad range of countries, the OECD has consistently found that there is only a small and tenuous link between national economic performance and types of industrial relations systems.¹²

In particular, the state and territory governments noted that highly regulated labour markets and countries with more corporatist bargaining models have recorded similar productivity levels to countries with much less regulation, suggesting that a range of factors drive productivity. However, as noted by the state and territory governments with reference to the New Zealand experience under the Employment Contracts Act 1991, it is difficult to achieve co-operative, productive working relationships based on a ‘take it or leave it’ approach, as distinct from an approach based on mutual agreement.¹³

8. Wooden, op. cit., p. 152. Also see J. Romeyn, ‘The law, arbitration and bargaining’, *Industrial relations research monograph*, No. 5, Department of Industrial Relations, July 1994, pp. 8–9.

9. *Seeking a Balance*, op. cit.

10. Woden, op. cit., p. 176.

11. Submission to the Senate Employment, Workplace Relations and Education Legislation Committee Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005 on behalf of the Governments of New South Wales, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory, and the Northern Territory, 9 November 2005, p. 41.

12. *ibid.*, p. 46.

13. *ibid.*, p. 48.

The role of industrial action in collective bargaining systems

It is widely recognised that the owners of the means of production have power superiority over those who sell their labour for wages.¹⁴ In the absence of agreement or legislated minimum standards, employers have the capacity to restrict the price they will pay for labour, downsize their operations, move their enterprises elsewhere (including to other countries) or close their operations. Individual employees by comparison are in a relatively weak bargaining position. They may seek to negotiate individually or may refuse to work on the terms offered—‘voting with their feet’. Employees may also express their ‘collective voice’ to bring their grievances and demands to the attention of management through their representatives. And it has been found that the collective voice mechanism reduces individual exit behaviour (such as labour turnover).¹⁵

Strikes and other forms of industrial action represent the further expression of collective voice by employees and may help to balance their bargaining power *vis a vis* the employer. Indeed, strike action has been recognised as playing such an indispensable role in resolving deadlocks in collective bargaining relationships as to be regarded as an **essential** ingredient of free collective bargaining, as Paul Weiler explains:

... the stoppage of work affects both sides, inflicting harm and putting pressure not only on the employer, but also on the union as a lever towards settlement. Even more important, it is the prospect of impending strike action (especially if the parties have previously had real life experience of it) which is a powerful prod to agreement as negotiations reach the critical point ... The ability to compromise simply would not be there unless the parties were both striving mightily to avoid the harmful consequences of a failure to settle. In the larger system it is the credible threat of the strike to both sides, even more than its actual occurrence, which plays the major role in our system of collective bargaining.¹⁶

For these reasons, Weiler suggests that banning strikes would effectively end collective bargaining.¹⁷

Industrial action may occur **defensively**, as a form of protest against, or frustration with decisions made by management (or some other authority, such as government). Or it may occur **offensively** (or proactively), as an attempt to exert pressure on the employer to improve

14. Note, however, that some commentators reject the notion of an inherent power imbalance and argue that there is no case for ‘special legislation to encourage or allow collective bargaining or ... prevent exploitation by employers.’ See Des Moore, Director, Institute for Private Enterprise, ‘The case for minimal regulation of the labour market: Address to Stonnington University of the Third Age Group’, <http://www.ipe.net.au/ipeframeset.htm>, accessed 18 June 2008.

15. M. Bray, S. Deery, J. Walsh and P. Waring, *Industrial Relations: A contemporary approach*, McGraw-Hill Australia, North Ryde, 3rd ed., 2005, p. 322.

16. P. Weiler, *Reconcilable differences: New directions in Canadian labour law*, Carswell, Toronto, 1980, p. 66.

17. *ibid.*, p. 67. Similarly, Jacobs argues that in the absence of a right to strike ‘collective bargaining would amount to collective begging’. A. Jacobs cited in T. Novitz, *International and European protection of the right to strike*, Oxford University Press, Oxford, 2003, p. 50.

wages or working conditions or other aspects of the employment relationship.¹⁸ Similarly, employers may take industrial action defensively or offensively—as discussed further below.

Less organised manifestations of workplace discontent include absenteeism, labour turnover and industrial sabotage. These forms of conflict may increase in incidence in situations where constraints are imposed on the right to take industrial action, if workplace grievances are not redressed.¹⁹

Because of the role of industrial action in collective bargaining systems, collective bargaining is sometimes perceived as a ‘law of the jungle’ or a ‘might is right’ approach; where the weak suffer at the hands of the strong and power struggles prevail. However, a poorly understood characteristic of collective bargaining is that stable collective bargaining relationships are dependent on reasonably even power bases existing between the parties.²⁰

Legislative frameworks have long been recognised internationally as having an important role to play in equalising power bases and promoting stable bargaining, for example, by:

- imposing obligations on employers to recognise trade unions
- imposing obligations on employers and employee representatives to bargain in good faith
- specifying fair and unfair bargaining practices
- setting a floor to bargaining (for example by legislating minimum terms and conditions of employment which cannot be undercut by bargaining)
- providing for legally protected industrial action as a means to balance the economic power of the bargaining parties
- defining acceptable limits to industrial action
- defining the circumstances in which third party neutrals should intervene in disputes
- establishing procedures for the suspension of bargaining in a crisis.

18. R. Callus, A. Morehead, M. Cully and J. Buchanan, *Industrial relations at work: The Australian Workplace Industrial Relations Survey*, AGPS, Canberra, 1991, p. 61; International Labour Office, *General Survey on the application of the Conventions on Freedom of Association, the Right to Organise and Collective Bargaining and the Conventions and Recommendations concerning Rural Workers’ Organisations: Report of the Committee of Experts on the application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution)*, volume B, International Labour Conference, 69th session, Geneva, 1983, p. 62.

19. For example, see Bray et al., op. cit., pp. 306–329; and *Seeking a balance*, op. cit.

20. Niland, op. cit., p. 70; O. Kahn-Freund and B. A. Hepple, *Laws against strikes*, Fabian Society, London, 1972, pp. 6–8.

Otto Kahn-Freund described this role of labour law as establishing the ‘rules of the game’ necessary to protect the parties from each other and to protect the public interest.²¹

If the legislative framework is to provide a stable, lasting foundation for encouraging mutually beneficial relations, it must strike a fair balance between workers’ and employers’ interests, between social and economic considerations, between rights and responsibilities, between individual and democratic rights and between the public interest and the requirements of voluntary collective bargaining.²² Undue politicisation of the legislative framework which allows the power balance to tip strongly towards either workers or employers can impede the fundamental compromises and self-determination which are the essential foundations of effective bargaining. If this happens, relationships between employers, employees and their representatives may also be politicised—leading to mistrust and discontent. Furthermore, tipping the balance strongly one way and then another as the political pendulum swings, can lead to instability and undermine the development of mature, cooperative relationships.²³

The **peaceful resolution** of industrial disputes through rational discussion and exchange of views should, of course, be regarded as the **preferred means** of settling work related differences. Within a context in which the rules of the game are specified within a fair and balanced legislative framework, however, industrial action can play an important role in resolving conflicts of interest. In particular, it can force a party that is refusing to negotiate to come to the negotiating table, and it can help to bring about the attitudinal change necessary to narrowing the gap between the positions of the parties—especially where a difficult bargaining impasse develops.

It may be argued that strikes damage economic performance, reduce living standards and destroy jobs. According to this argument, given the damaging nature of strikes, society has a right to expect strict regulatory arrangements will be imposed to ensure that strikes are used sparingly and responsibly—and are effectively a last resort.²⁴ It should be noted, however, that, in addition to the role of industrial action in collective bargaining outlined above, Tonia Novitz has reviewed empirical studies and found that there is no evidence that suppressing industrial action leads to better macro or micro-economic outcomes in the longer term.²⁵ As Novitz explains:

If collective bargaining is not accompanied by a legally recognized right to strike the outcome may be lower wages or cheaper labour; but this does not necessarily result in higher productivity or competitiveness. Instead, low wages may merely allow an inefficient

21. O. Kahn-Freund, ‘Industrial relations and the law 1975—retrospect and prospect’, in B. Barrett, E. Rhodes and J. Beishon (eds.), *Industrial relations and the wider society: aspects of interaction*, Collier Macmillan, London, 1975, p. 386.

22. See *Seeking a balance*, op. cit., Chapter 4 for a more in depth discussion of these considerations.

23. *ibid.*

24. G. Orr and S. Murugesan, ‘Mandatory secret ballots before employee industrial action’, *Australian Journal of Labour Law*, 20, 2007, p. 275 quoting the Thatcher Government’s rationale for introducing mandatory ballots in the UK.

25. Novitz, op. cit. pp. 75–83.

business to hide its managerial, organizational, and other inadequacies, while increasing the dependency of waged workers on social security.²⁶

Strikes are not the preferred means of resolving disputes as they involve costs for all parties—those taking industrial action will suffer a loss of income if they stop work, employers suffer disruption to their operations and the public may also be affected. However, taking a broader perspective, the right to take industrial action is a fundamental pre-condition for stable, voluntary collective bargaining which is itself a process of recognised social and economic benefit.

Internationally recognised constraints on industrial action

The right to take industrial action is frequently referred to in shorthand as the ‘right to strike’. However, industrial action may take a number of forms, including strikes, bans and limitations on work (such as ‘go-slows’ and ‘work-to-rules’), secondary boycotts, picketing and sit-ins. It may also include lockouts by employers. A right to strike which covers the range of forms of industrial action has been recognised by international organisations of which Australia is a member—and is expressed or implied in conventions which Australia has ratified.²⁷

In recognition of the important role of industrial action, a right to strike in support of economic and social interests is expressly protected by the United Nations International Covenant on Economic, Social and Cultural Rights, which provides:

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country. (Emphasis added.)

26. *ibid.*, p. 81.

27. For further information on the ILO, its supervisory bodies, core labour standards, Australia’s membership of the organisation and ratification of core conventions see J. Romeyn, *The International Labour Organisation’s core labour standards and the Workplace Relations Act 1996*, Research Paper, Parliamentary Library, November 2007.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

The International Labour Organisation's (ILO's) Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention 1949 (No. 98) do not make explicit reference to the right to strike. For this reason, in *Victoria v Commonwealth*, the Australian High Court found the external affairs power of the Australian Constitution and the International Covenant on Economic, Social and Cultural Rights to be an appropriate source of legislative authority to enact provisions supporting lawful industrial action during bargaining periods, because it specifically refers to a right of strike.²⁸

Nevertheless, the right to strike has been taken to be an integral part of the Principles of Freedom of Association developed by the ILO Governing Body's Committee on Freedom of Association. It is considered to be an intrinsic corollary of the right to organise which is protected by Convention No. 87, deriving from the right of workers' organisations to formulate their programs of activities to further and defend the economic and social interests of their members.²⁹ The ILO's Committee of Experts has said that:

... the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. These interests not only have to do with obtaining better working conditions and pursuing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers.³⁰

The ILO's supervisory bodies have consistently interpreted the right to strike as extending to **all** forms of industrial action.³¹

28. *Victoria v Commonwealth*, (1996) 187 CLR 416, pp. 545–546. Note that, in these circumstances, it was not necessary for the High Court to decide whether the relevant ILO convention would also provide a source of legislative authority and the majority decision is silent on this issue.

29. B. Creighton and A. Stewart, *Labour Law*, 4th edition, the Federation Press, Sydney, 2005, p. 533; R. Dalton and R. Groom, 'The right to strike in Australia: International treaty obligations and the external affairs power', *Melbourne Journal of International Law*, 9, 2000; B. Gernigon, A. Odero and H. Guido, *ILO Principles concerning the right to strike*, International Labour Office, Geneva, 2000.

30. ILO, *General Survey*, 1983, op. cit., p. 62, para. 200, quoted in Creighton and Stewart, *ibid.*, p. 533.

31. ILO, *ibid.*, p. 68.

However, the right to strike is **not absolute** and it may be subject to certain legal conditions, restrictions and prohibitions.³² The ILO has recognised a number of limitations on the right to strike, principally:

- Strikes that are purely political in character do not fall within the scope of the principles of freedom of association. However, the ILO considers that protest strikes aimed at criticising or influencing a government's economic and social policies should be allowed.³³
- Restrictions on industrial action can be justified if the action ceases to be peaceful.³⁴
- A temporary restriction on strikes is acceptable where it prohibits strike action in breach of collective agreements (such as a 'no further claims' provision in an agreement or an agreed provision for resolving rights disputes).³⁵
- Limitations such as notice of the intention to strike, an obligation to engage in conciliation, provision for voluntary arbitration, cooling-off periods and ballot requirements are permitted provided they are not so cumbersome as to render lawful strike action to be very difficult or impossible in practice.³⁶
- Penal sanctions against strikes should only be imposed where there are violations of strike prohibitions which are in conformity with the principles of freedom of association. In addition, sanctions should be proportionate to the offences committed and penalties of imprisonment should not be imposed in the case of peaceful strikes.³⁷
- A general prohibition on the right to strike can be justified only in circumstances of acute national crisis and for a limited duration.
- A general prohibition on sympathy action does not conform to the relevant convention—workers should be permitted to take sympathy action provided the initial strike they are supporting is itself lawful.³⁸
- Restrictions on picketing are acceptable if they are confined to cases in which picketing ceases to be peaceful or interferes with the freedom to work of non-strikers.³⁹

32. International Labour Office, *Labour legislation guidelines*, Chapter 5: Substantive provisions of labour legislation—the right to strike, <http://www.ilo.org/public/english/dialogue/ifpdial/ilg/index.htm>, accessed 9 May 2008. Also see Gernigon et al., op. cit.

33. For example, ILO: Committee on Freedom of Association, *139th Report*, Case nos. 737–744, para. 124; and ILO, *General Survey*, 1983, op. cit., p. 67.

34. ILO, *General Survey*, *ibid.*, p. 68.

35. Gernigon et al., op. cit., p. 33.

36. *ibid.*, pp. 33 and 55–56.

37. *ibid.*, p. 69.

38. *ibid.*, pp. 45 and 68.

- A permanent ban on strikes should only be imposed on public servants acting in their capacity as public authority officials and workers in essential services and should be compensated by the existence of adequate impartial and speedy conciliation and arbitration procedures.⁴⁰
- Hiring of workers to replace strikers seriously impairs the right to strike, but is acceptable in essential service strikes or situations of acute national crisis.⁴¹
- A minimum safety service may be imposed in all cases of strike action when such minimum services are intended to ensure the safety of persons, the prevention of accidents and the safety of machinery and equipment.⁴²
- Wage deductions for days of strike do not offend the principle of freedom of association, however, in general, the parties should be free to determine the scope of negotiable issues and payment of wages for the period of a strike should neither be required nor prohibited.⁴³
- Restrictions relating to the objectives of a strike and the methods used are allowable if they are sufficiently reasonable so as not to result in practice in a total prohibition or an excessive limitation on the exercise of the right to strike.⁴⁴
- The protection of freedom of association does not cover abuses in the exercise of the right to strike, such as failure to comply with reasonable requirements regarding lawfulness or acts of a criminal nature. Sanctions imposed in the event of abuse must not be disproportionate to the seriousness of the violations.⁴⁵

Constraints recognised by the ILO attempt to ensure that the right of the parties to take industrial action is balanced against other fundamental rights of workers, employers and the public—such as the freedom to work of non-strikers and the right to protection of property and personal safety.⁴⁶ This is sometimes misunderstood by governments which, in attempting to protect the ‘public interest’, impose constraints that effectively limit **any successful industrial action**. As Shae McCrystal notes, the role of the law with respect to protected action should allow for ‘adequate accommodation of the fact that negative effects from industrial action are a necessary consequence of voluntary collective bargaining.’⁴⁷

39. *ibid.*, p. 56.

40. *ibid.*, p. 70.

41. *ibid.*, p. 56.

42. *ibid.*, p. 55.

43. *ibid.*, p. 48.

44. *ibid.*

45. *ibid.*, p. 56.

46. *ibid.*, p. 42.

47. S. McCrystal, ‘Shifting the balance of power in collective bargaining: Australian law, industrial action and Work Choices’, *The Economic and Labour Relations Review*, 16 (2), May 2006, p. 210.

It should be acknowledged that the ILO has faced pressures to reassess its role and reform its standard setting and supervisory mechanisms with a view to modernising its standards and streamlining its arrangements. In response to those pressures, the ILO commenced a process to review its conventions and recommendations and declared some to be outdated and no longer binding. It also refocused its attention on a set of fundamental principles and core labour standards. However, Novitz points out that the review of ILO conventions has not led to any diminution in the status of ILO Conventions Nos. 87 and 98, but rather, has resulted in their elevation as core labour standards. She also notes that revision of reporting procedures has not significantly changed the role of the Committee of Experts, and there is no indication of any radical change that would impact on the jurisprudence concerning the right to strike.⁴⁸ Both Convention No. 87 and Convention No. 98 have been ratified by Australia and create binding international legal commitments.

Legislative developments and the right to strike in Australia

Until the 1990s, collective bargaining in Australia operated in a virtual legislative vacuum.⁴⁹ Legislatures relied on the conciliation and arbitration power of the Australian Constitution (section 51(xxxv)) to provide the basis for the industrial relations framework. They refrained from enacting legislation to regulate collective bargaining, which instead took place within the dominant conciliation and arbitration system. This system was based on the presumption that ‘justice and reason’ should replace the ‘law of the jungle.’ There was no legislative protection of the right to strike.⁵⁰ Trade unions and their members were not only liable to actions for damages in tort and contract, but

... both State and federal parliaments [had] adopted a quite extraordinary range of legislative proscriptions against industrial action, the operation of which [was] additional to the common law. The end result [was] that for all practical purposes it was impossible, at least before 1993, for any group of Australian workers lawfully to take industrial action to protect or promote their occupational interests.⁵¹

While legal sanctions against unions and employees were rarely used, their possible application placed workers and their representatives in a precarious position. This system did not attract ILO criticism, in part because legal sanctions were so rarely used, but also because impartial and speedy conciliation and arbitration processes compensated for the absence of protection for the right to strike. In addition, it was not until 1973 that Australia ratified ILO Convention No. 148, the Freedom of Association and Protection of the Right to Organise Convention and ILO Convention No. 158, the Right to Organise and Collective Bargaining Convention.

By the late 1980s, strong pressures emerged for greater autonomy at the workplace level and the use of enterprise and workplace bargaining to assist the process of modernising

48. Novitz, op. cit., pp. 340–368. Also see Romeyn, *The International Labour Organisation’s core labour standards*, op. cit.

49. Niland, op. cit., pp. 6 and 71.

50. K. Ewing, ‘The right to strike in Australia’, *Australian Journal of Labour Law*, 2 (1), March 1989, pp. 18–39.

51. Creighton and Stewart, op. cit., p. 536.

Australian workplaces. These pressures necessitated a rethinking of the role of state intervention in industrial relations (through the mechanism of conciliation and arbitration tribunals) as a means of settling the terms and conditions of employment. It also required a rethinking of the role of collective bargaining and industrial action within the Australian industrial relations system.

In response to these pressures, the Australian Industrial Relations Commission (AIRC) began a process of 'managed decentralism' which involved award restructuring and the removal of restrictive work and management practices under a 'two-tiered' wage system. However, frustrated by the speed of the AIRC's processes and the constraints imposed on workplace bargaining, in 1992 the Keating Government passed legislation to promote the use of certified agreements and encourage greater flexibility and self-determination at the workplace level.

The 1980s also witnessed some well publicised actions in industrial tort, such as the Dollar Sweets case, the Air Pilots case and the Odco case,⁵² as well as actions under the secondary boycott provisions of the *Trade Practices Act 1974*.⁵³

In 1989, the ILO's Committee of Experts raised concerns with the Australian Government about the lack of protection for industrial action from common law liability. In 1991, after considering the Government's response, the Committee of Experts expressed the decided view that Australia's law and practice was not fully in compliance with Australia's international obligations.⁵⁴ As Breen Creighton explains, the move to enterprise bargaining:

... made it increasingly difficult to justify the lack of protection against common law liability: first because the notion that the 'new province for law and order' allegedly constituted by compulsory conciliation and arbitration could no longer be said to justify (express or implied) proscription of all forms of industrial action, and second because the logic of collective/enterprise bargaining required that workers should have the capacity lawfully to withdraw their labour as part of the negotiating process.⁵⁵

52. *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia*, 1986 AILR, para. 29; *Ansett Transport Industries (Operations) Pty Ltd & Others v Australian Federation of Air Pilots and others* (1989) 95 ALLR, p. 211; and *Building Workers Industrial Union and others v Odco Pty Ltd* 1991 AILR para. 129.

53. For example, *Mudginberri Station Pty Ltd v AMIEU and others*, 1986 AILR, para. 283. The Mudginberri case was the first time that an action under section 45D of the Trade Practices Act had been progressed to the payment of damages. Section 45D was inserted into the Act in 1977.

54. *ibid.* Also see 'Direct Request relating to Convention No 87 from the Committee of Experts to the Australian Government (1989)'; 'Direct Request from the Committee of Experts concerning Convention No. 87 to the Australian Government (1991)'; and 'Direct Request from the Committee of Experts concerning Convention No. 87 to the Australian Government (1995)', available through the ILO's Database on International Labour Standards: <http://www.ilo.org/ilolex/> accessed 9 May 2008.

55. B. Creighton, 'The Workplace Relations Act in international perspective', *Australian Journal of Labour Law*, 10, 1997, p. 36.

The *Industrial Relations Reform Act 1993*

In response to the pressures noted above, and taking into account the ILO's criticisms, the Keating Government passed the *Industrial Relations Reform Act 1993*, which (amongst other changes) amended the *Industrial Relations Act 1988* by defining the scope for legitimate industrial action—termed 'protected action'—for the first time in Australia. In short, the reforms provided protection for industrial action if:

- it occurred in a 'protected bargaining period' for a proposed single business certified agreement
- the action was directed against that employer
- written notice (72 hours) of the intention to take industrial action was given by either party.

Protected action was not made available in relation to:

- the negotiation of non-union agreements
- the determination of awards, or where
- industrial action involved personal injury, wilful or reckless damage, the unlawful taking of property or defamation.

The protected bargaining period ended when the bargaining period ended—which could occur either because the parties had reached agreement or because the AIRC suspended or terminated the bargaining period.

The AIRC was able to suspend or terminate a bargaining period if it considered that a party:

- was not genuinely trying to reach agreement or
- was not complying with directions to bargain in good faith.

The Commission could also terminate a bargaining period if industrial action was threatening to endanger the safety, health or welfare of the public or cause significant damage to the Australian economy. Consistent with the objective of encouraging greater self determination, this was the only ground for suspension or termination of the bargaining period on which the AIRC could act on its own motion or on application by the Minister, rather than on application by a party to the dispute.

Section 127 of the *Industrial Relations Act 1988* as amended enabled the AIRC to make orders to stop or prevent industrial action by persons engaged in public sector employment. Section 166 required a party who wished to bring proceedings to recover damages in tort for loss resulting from unprotected industrial action to apply firstly to the AIRC for a certificate. Section 166A established a pre-litigation conciliation period of up to 72 hours before civil actions in tort could be brought. Revisions were also made to the secondary boycott provisions of the *Trade Practices Act 1974*. The provisions were removed from the Trade

Practices Act, inserted in the Industrial Relations Act and the AIRC was given a greater role in the application of the provisions.⁵⁶

In support of the 1993 reforms, the Minister for Industrial Relations, Laurie Brereton, said that ‘the legislation will give effect to Australia’s international obligations in respect of the rights of workers to engage in industrial action.’⁵⁷ The explanatory memorandum to the *Reform Act* also made it clear that the amendments were made in response to criticism by the ILO’s supervisory bodies that Australia had failed to meet its obligations under international conventions:

Australia has in recent years been the subject of adverse comment made by the ILO supervisory bodies in respect of the unrestricted exposure of trade unions and their members to damages at common law for industrial action. The new sections of Division 4 of Part VIB aim to restrict that exposure in circumstances where the right to take industrial action is peculiarly in need of protection.⁵⁸

A number of other changes were also made in 1993, as part of the process of developing a legislative framework for bargaining and encouraging greater self regulation at the workplace level.⁵⁹ In particular, the 1993 reforms sought to place greater emphasis on conciliation, rather than arbitration and encouraged bargaining at the workplace level. Union negotiated collective agreements continued to be available and in addition, the 1993 reforms introduced the possibility of non-union agreements negotiated directly between employers and workers (which were called ‘enterprise flexibility agreements’). Both forms of agreement were underpinned by comprehensive awards.

The *Workplace Relations Act 1996*

Following the March 1996 federal election, the Howard Government extensively amended the *Industrial Relations Act 1988* and renamed it the *Workplace Relations Act 1996*. Reforms implemented at that time included the paring back of awards to 20 ‘allowable matters’ and the introduction, for the first time in the federal sphere, of statutory individual agreements (Australian Workplace Agreements or AWAs).

Provisions relating to protected bargaining periods and industrial action were substantially rewritten, including by:

- making protected action possible where the parties were negotiating an AWA or non-union agreement

56. Creighton and Stewart, op. cit. p. 537; Romeyn, ‘The law, arbitration and bargaining’, op. cit., pp. 22–24.

57. Laurie Brereton, Minister for Industrial Relations, House of Representatives, *Debates*, 28 October 1993, p. 2782 quoted in Dalton and Groom, op. cit.

58. Brereton quoted in Dalton and Groom, op. cit.

59. For a summary of these changes, see Romeyn, ‘The law, arbitration and bargaining’, op. cit.

- removing the AIRC's ability to make orders to ensure that parties negotiating an agreement did so 'in good faith', but including provision that the parties must 'genuinely' try to reach agreement before taking protected action
- prohibiting any payments to employees for periods during which they were on strike
- enabling the AIRC to suspend or terminate a bargaining period where
 - a party taking industrial action was not genuinely trying to reach an agreement with other parties or
 - industrial action would endanger the life, personal safety or health, or the welfare of the population or part of it, or would cause significant damage to the Australian economy or an important part of it
- amending and broadening the scope of section 127 to provide the AIRC with discretion to give a direction that **any** industrial action that was happening, threatened, impending or probable, and that was not deemed to be protected industrial action, stop or not occur—including action beyond the public sector. Such orders could be made of the Commission's own motion or on the application of a party to an industrial dispute, a person who was directly affected or was likely to be directly affected by the industrial action
- removing the pre-litigation conciliation period
- restoring the secondary boycott provisions to the Trade Practices Act.

Action arising from a reasonable concern by an employee about an imminent risk to health and safety was excluded from the definition of industrial action.

The 2005 Work Choices amendments

Further significant amendments were made to the Workplace Relations Act in 2005 when the Howard Government gained control of the Australian Senate. The *Workplace Relations Amendment (Work Choices) Act 2005* made significant changes to the industrial relations legislative framework—perhaps the most significant being those designed to move towards a single, national system of workplace regulation relying on the corporations and other powers of the Constitution (rather than the conciliation and arbitration power). Other key changes included the abolition of the 'no disadvantage' test for both AWAs and collective agreements, defining matters which could not be included in workplace agreements ('prohibited content') and the introduction of a set of legislated pay and conditions standards which all agreements were required to meet.

The Work Choices amendments have been extensively described and reviewed in a number of academic studies.⁶⁰ For the purposes of this paper, the following key changes were made to the arrangements relating to industrial action. The amendments:

60. For example, R. Sappey, J. Burgess, M. Lyons and J. Buultjens, *The new federal workplace relations system: updated edition*, Pearson Education Australia, Frenchs Forest, 2007.

- removed the possibility of protected action in relation to the negotiation of AWAs
- added new exclusions from protected action, relating to
 - industrial action supporting a claim for the inclusion of ‘prohibited content’ and
 - industrial action in support of pattern bargaining
- strengthened the provisions relating to industrial action undertaken before the expiry date of an existing agreement to remove the problem exposed by the *Emwest* decision (see discussion further below)
- required industrial action by employees to receive prior approval by secret ballot in order to attain protected status
 - except where industrial action is taken *in response* to industrial action by the employer
- reduced the AIRC’s discretion in relation to the suspension or termination of a bargaining period in defined circumstances. For example, the AIRC must suspend or terminate a bargaining period
 - where parties have not complied with AIRC orders or directions
 - where parties have not genuinely tried to reach agreement
 - where industrial action threatens to endanger life, personal safety or health of the population or a part of it or threatens to cause significant damage to an important part of the Australian economy
 - where industrial action is significantly damaging a third party
 - where industrial action relates to a demarcation dispute or
 - if the AIRC is satisfied that pattern bargaining is occurring
- reduced the AIRC’s discretion regarding remedies for unprotected action, for example
 - the AIRC must make an order against any action that does not appear to be protected and
 - the AIRC is required to issue interim orders against industrial action if it is unable to determine an application within 48 hours
- removed the requirement that the AIRC’s orders must state the specific industrial action sought to be prohibited
- required the AIRC to suspend a bargaining period involving protected action if one of the negotiating parties requests a ‘cooling off’ period and the AIRC is satisfied that a suspension is appropriate

- provided a new remedy allowing injunctive relief to be sought by any person against action to support or advance claims by pattern bargaining
- enabled proceedings to be initiated in tort without first seeking a certificate from the AIRC
- required an employee seeking to rely on the health and safety exemption to prove that he/she had a reasonable concern about an imminent risk to health and safety (thereby reversing the onus of proof)
- enabled the Minister to terminate a bargaining period without recourse to the AIRC if he/she was satisfied that industrial action was threatening to endanger the life, safety, health, welfare of the population or part of it, or otherwise damage the Australian economy or an important part of it in a significant way
- required a minimum deduction of four hours' pay in respect of any period of industrial action
- made the contravention by a person of an order against industrial action a criminal offence, punishable by 12 months imprisonment
- confined 'industrial action' by employers to include only lockouts 'within the ordinary meaning of that term'.⁶¹

Prior to the 2005 amendments, not all industrial action was penalised, even if it was unprotected. The AIRC considered that the power in section 27 of the Workplace Relations Act created discretion for the Commission to intervene where it considered it appropriate to prohibit industrial action. The exercise of the discretion was predicated on the Commission itself imposing a prohibition on the industrial action to make it unlawful.⁶²

The Work Choices amendments **reduce the scope** for protected action (by adding new exclusions from protected action). In addition, by severely limiting the exercise of discretion by the AIRC, they **heighten the dichotomy** between protected and unprotected industrial action. They effectively ensure that all unprotected action is treated as illegitimate and unlawful, regardless of the industrial or other circumstances.⁶³ The AIRC must make an order against any unprotected industrial action occurring in the federal system or affecting a constitutional corporation and any continuation of the action will be liable to enforcement action and fines in the courts. Further, protected action is made **more difficult to access** by complex procedures relating to bargaining periods and ballot processes (considered further below). Even where these provisions are successfully navigated, there are a number of grounds on which bargaining periods may be suspended or terminated by the AIRC—thereby ending the protected action. Third parties (that is, not negotiating parties) affected by strikes

61. C. Briggs, 'Lockout law in Australia: The case for reform', *Journal of Industrial Relations*, 49 (2), April 2007, pp. 179–180 notes that confining employer industrial action to lockouts excludes some employer tactics, such as withholding overtime.

62. For example, see *Coal & Allied Operations Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union & Others*, (1997) 42 AILR para. 3–582.

63. C. White, 'Work Choices: Removing the choice to strike', *Australian Journal of Political Economy*, no. 56, December 2005, p. 68; McCrystal, 'Shifting the Balance', op. cit., p. 208.

are able to bring proceedings to obtain injunctive relief or damages without first applying to the AIRC. The Minister may also intervene without recourse to the AIRC. These changes preclude more industrially sensitive measures to resolve an issue and place a higher value on the public interest than on the importance of the parties finding a lasting solution to a bargaining impasse.⁶⁴

By contrast, Chris Briggs argues that the provisions of the Workplace Relations Act relating to employer lockouts are the most ‘liberal’ or ‘deregulated’ in the OECD. He points out that other OECD countries have rejected an equal right to strike and lockout, reserving lockouts for exceptional circumstances in recognition of the desirability of maintaining ‘the broad equilibrium of power that underpins effective agreement making.’ He notes that AWA industrial action (including lockouts) was abolished by the 2005 reforms. However, he suggests that the ease of access to lockouts available to employers under the Workplace Relations Act, combined with the myriad of constraints on employee initiated industrial action, tip the balance of power firmly in favour of employers and require further reform.⁶⁵

Background to the legislative changes

When industrial disputation in Australia was at relatively high levels during the 1970s, Niland argued that the cost of industrial action was often exaggerated while its positive value as an agent of attitudinal change was misunderstood:

... Australian employers tend to agonise more over production loss through industrial disputes than over the same value of production loss through machine breakdown, inner-city traffic congestion, or loss through injury, sickness and absenteeism. Putting the issue into perspective, the case simply cannot be sustained that time lost through strikes is a major force in reducing economic activity below what it should be.⁶⁶

Many employers would have disputed this view in the 1970s. Since that time, however, there has been a dramatic fall in industrial disputation in Australia (see [Appendix B](#) for further detail). Despite that fall, fears continue to be expressed about a possible ‘explosion’ of industrial action and strikes continue to attract significant media attention, which may suggest that there is a certain paranoia about strikes which is not evidence based.⁶⁷ Certainly, with industrial disputes at the lowest levels on record, a number of commentators have argued that it is very difficult to defend the imposition of the additional constraints on industrial action that were introduced in 2005.⁶⁸

Underpinning the decline in industrial action has been a multitude of economic, social, cultural and structural changes, including rising living standards, more stable economic

64. McCrystal, op. cit., pp. 198–211.

65. Briggs, op. cit., pp. 167–185.

66. Niland, op. cit., pp. 4 and 44.

67. For example, the Chief Executive of the Australian Chamber of Commerce and Industry quoted in *The Australian Financial Review*, 6 May 2008, p. 10.

68. For example see Sappey et al., op. cit., p. 30; and G. Orr and S. Murugesan, ‘Mandatory secret ballots before employee industrial action’, *Australian Journal of Labour Law*, 20, 2007, p. 294.

conditions, a fall in trade union membership, displacement of strike activity by alternative dispute resolution, globalisation, the decline of the manufacturing sector and the growth of the services sector and the increased number of women, young people, part-time and casual employees (see Appendix B for more detail).

Suggestions by some employer representatives that a loosening of constraints will lead to an ‘explosion’ in industrial action require critical consideration against this background. Legislative changes to the industrial relations framework undoubtedly have had some impact on the incidence of industrial action, but relaxing legislative constraints in the context of the continued operation of other economic, social and structural factors is unlikely to bring about a significant change in its incidence.

It should also be noted that while employee industrial action steadily declined from the 1980s, the period of operation of the Workplace Relations Act has witnessed a significant increase in the percentage of working days lost to industrial disputes that can be attributed to employer lockouts. As Richard Sappey et al. note:

The percentage of working days lost in industrial disputes that can be attributed to employer lockouts has increased from 1.6% in the years 1994 to 1998, to 9.3% in the years 1999 to 2003 (the period when the Workplace Relations Act 1996 was in full operation). Moreover, the percentage of long industrial disputes (i.e. lasting several days or weeks) that can be attributed to employer lockouts has increased from 7.7% to 57.5% in the same time periods.⁶⁹

Removal of the right to take protected industrial action in relation to the negotiation of AWAs in 2005 addressed this trend in part, as it removed the ability of employers to isolate individuals through an individual lockout without pay.⁷⁰ However, when compared to the constraints on employee and union initiated industrial action, employer access to industrial action associated with collective bargaining remains relatively unfettered (see further discussion below).

If the reforms of 2005 were not a response to the incidence or trends in industrial dispute in Australia, what were the underlying factors behind them? An article published by the Australian Chamber of Commerce and Industry (ACCI) in 2002 succinctly encapsulated the employer philosophies which the government supported in its reforms.⁷¹

The ACCI argued that there were three key conditions that accompanied the introduction of a right to strike, each of which was critical to support for legislative recognition of that right from the employer’s perspective:

1. that the right to strike would only be available as a last resort after there had been genuine enterprise-based (not industry-wide) bargaining, as well as attempts at conciliation

69. *ibid.*

70. McCrystal, ‘Shifting the Balance’, *op. cit.*, p. 200; R. McCallum, ‘Australian Workplace Agreements—an analysis’, *Australian Journal of Labour Law* 10, 1997, p. 56.

71. ACCI, ‘The Right to Strike’, *ACCI Review*, No. 89, July 2002.

2. that the right to strike would only be exercisable in the negotiation of agreements (i.e. before they were made, or after their expiry) but not during the life of agreements
3. that the right to strike could only be taken over disputes or demands which concerned industrial matters (matters between employers and employees).⁷²

The ACCI argued that the rationale for these conditions was ‘simple’:

... once industrial action extends beyond this single-workplace focus, the justification for providing legal immunity for strike action disappears and the economic damage that strikes can inflict escalates.⁷³

The ACCI acknowledged the substantial decline in working days lost to industrial action which had occurred in Australia, but expressed concern for ‘pockets of industry’ that were being ‘beset by industrial action’; naming the Australian manufacturing industry, the Australian car industry and the construction industry as areas for concern. The ACCI was concerned that unions in these industries were pursuing enterprise agreements with common terms and common expiry dates and that this would lead to industry-wide campaigns and pattern bargaining—which it saw as incompatible with genuine enterprise bargaining. The ACCI argued that this outcome breached the first of the three key conditions for recognition of a right to strike.

The ACCI also argued that the second and third key conditions for recognition of the right to strike had been undermined by the Federal Court decisions in the *Emwest*⁷⁴ and *Electrolux*⁷⁵ cases. It advocated that the government address these concerns and also introduce requirements for approval of industrial action by a secret ballot and a cooling off period for protracted industrial action. These arguments provided support for reforms which had been suggested by the government as early as 1998 and were implemented by the government in the 2005 reforms.⁷⁶

72. *ibid.*

73. *ibid.*

74. In the *Emwest* case (*Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* (2002) FCA, p. 61) the Federal Court found that protected industrial action could be taken during the term of an enterprise bargaining agreement if the strike was over a matter not contained in the agreement.

75. In the *Electrolux* case the Federal Court found that protected action could be taken over a union demand for any matter so long as the demand was genuinely what the striking party sought—that is, it was permissible to engage in industrial action over ‘non employment matters’ such as the levying of trade union bargaining fees on non-union members. The Federal Court decision was subsequently appealed to the High Court (*Electrolux Home Products Pty Ltd v AWU & Others* (2004) 221 CLR p. 309). The High Court found that to be validly certified, an agreement must be wholly about matters pertaining to the relationship between the employer and employees, in their capacity as employees.

76. Secret ballots and cooling-off periods had been raised by the federal government in a series of discussion papers, see: P. Reith, Minister for Workplace Relations and Small Business, *Pre-industrial action secret ballots*, Canberra, August 1998; and P. Reith, Minister for Workplace Relations and Small Business, *Pattern bargaining and industrial action*, Canberra, May 2000.

In analysing the 2005 reforms, however, it needs to be asked: have they achieved a fair balance between workers' and employers' interests, between social and economic considerations, between rights and responsibilities, between individual and democratic rights, and between the public interest and the requirements of voluntary collective bargaining? Or, has undue politicisation of the legislative framework allowed the power balance to tip strongly towards employers to the detriment of effective and voluntary collective bargaining?

ILO criticisms⁷⁷

Even before the passage of the Work Choices amendments, Australia's industrial relations system was subject to criticism by the ILO for imposing excessive obstacles on the free exercise of the right to take industrial action.⁷⁸ As Colin Fenwick and Ingrid Landau noted:

... the ILO's supervisory bodies have ... repeatedly [emphasised] that the right to strike should not be limited to industrial disputes that are likely to be resolved through the signing of a collective agreement. The right to strike extends to enabling workers to express their dissatisfaction through industrial action with economic and social policy matters that affect their interests.⁷⁹

In addition to this general concern, the Committee of Experts raised specific concerns about the conformity of several legislative provisions with the legitimate scope for industrial action. In particular, it has requested the government to amend the following provisions:⁸⁰

- Section 170MN of the Workplace Relations Act, which prohibited industrial action in support of multiple business agreements. Section 423(1)(b)(i) of the Workplace Relations Act as amended by the Work Choices Act, excludes such agreements from the procedure for initiating a bargaining period, thereby preventing protected industrial action in relation to such agreements. The Committee has repeatedly emphasised that the choice of

77. This section of this paper is extracted from Romeyn, *The International Labour Organisation's core labour standards*, op. cit., which examines more broadly the ILO's concerns regarding the implications of the Workplace Relations Act for Australia's obligations arising under fundamental convention and core labour standards.

78. McCrystal, 'Shifting the balance', op. cit., p. 196, citing International Labour Organisation, Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation, Convention 87*, Australia, 2004, and *Individual Observation, Convention 98*, Australia, 2005.

79. C. Fenwick and I. Landau, 'Work Choices in international perspective', *Australian Journal of Labour Law*, 19, 2006, pp. 140–141. Also see Creighton and Stewart, op. cit., p. 537 and Creighton, 'Freedom of Association', op. cit., pp. 315–319 for consideration of the extent of, and limitations on the right to strike.

80. ILO, Committee of Experts on the Application of Conventions and Recommendations (CEACR): *Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No 98)*, op. cit.; CEACR: *Individual Observation concerning Convention No 87, Freedom of Association and Protection of the Right to Organise, 1948, Australia (ratification:1973)*, 2004, <http://www.ilo.org/ilolex/>, accessed 20 September 2007; and CEACR: *Individual Observation concerning Convention No 87, Freedom of Association and Protection of the Right to Organise, 1948, Australia (ratification:1973)*, 1999, <http://www.ilo.org/ilolex/>, accessed 20 September 2007.

bargaining level should not be imposed by law, but made by the parties themselves who are in the best position to decide this matter.

- Section 187AA of the Workplace Relations Act—prohibiting industrial action in support of a claim for strike pay (section 508 of the amended Act). The Committee has observed that the mere fact that there are deductions from workers' pay for days on strike is not contrary to the Convention. However, it is incompatible with Convention 98 to impose such deductions by law in all cases as, in a system of voluntary collective bargaining, the parties should be able to raise this matter in negotiations.
- Section 45D of the *Trade Practices Act 1974*, which prohibits secondary boycotts and section 438 of Workplace Relations Act.⁸¹ The Committee has repeatedly emphasised that a general prohibition on sympathy strikes is incompatible with Convention 87 and that workers should be able to take such action, provided that the strike that they are supporting is lawful.
- Section 170MW of the Workplace Relations Act—which provided for the power of the AIRC to terminate a bargaining period, and thus the ability to take protected industrial action, when the action was threatening to cause significant damage to the Australian economy or an important part of it (section 430(3)(c)(ii) of the amended Act). The Committee has observed that prohibiting industrial action in these circumstances goes beyond the definition of essential services accepted by the Committee (namely, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population).⁸²
- Sections 30J and 30K of the *Crimes Act, 1914*—which prohibit industrial action threatening trade or commerce with other countries or among states and boycotts resulting in the obstruction or hindrance of the performance of services by the Australian Government or the transport of goods or persons in international trade.

In 2007, the Committee noted that, according to the ACTU, not only had the Committee's previous comments not been addressed, but the Work Choices Act introduced additional prohibitions on industrial action.⁸³ Specifically:

- preventing the taking of lawful industrial action relative to pattern bargaining (section 421)

81. Creighton and Stewart, op. cit., pp. 577–582 note that section 45D was repeatedly criticised by the ILO's Committee of Experts for the extent to which it prohibited activity which ought to be lawful in terms of Convention 87. They also provide further information on reforms to that section made in 1993 and 1996.

82. ILO, *General Survey on Freedom of Association and Collective Bargaining*, Geneva, 1994, para. 159.

83. ILO, CEACR: *Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) Australia (ratification: 1973)*, 2007, <http://www.ilo.org/ilolex/>, accessed 9 May 2008. For an outline of the changes made by the Work Choices Act with respect to industrial action, see S. McCrystal, 'Smothering the right to strike: Work Choices and industrial action', *Australian Journal of Labour Law*, 19, 2006, p. 201.

- further narrowing the range of matters which can be the subject of industrial action by providing that such action is not protected if it is taken in support of claims which include prohibited content (section 436)
- tightening the prohibition of industrial action taken in concert with other parties who are not protected (that is, sympathy strikes) (section 438). It is now mandatory for the AIRC to order that such action stop or if it has not yet occurred, that it not occur
- removing the discretion formerly held by the AIRC in respect of suspending or terminating a bargaining period in case of danger to the economy and making it mandatory to do so (section 430)
- making provision for a third party who is affected by the industrial action to apply for the suspension or termination of the bargaining period, which must be granted if the AIRC is satisfied that the employer is adversely affected and economic loss is also caused to the applicant (that is, without consideration of the interests of the employees involved) (section 433)
- enabling the Minister unilaterally to issue a declaration terminating a bargaining period in circumstances including threatened economic damage, thereby preventing the taking of protected industrial action (section 498). Section 500(a) provides for compulsory arbitration in this case with the decision being binding for up to five years under section 504(3).

The Committee observed that, to the extent that industrial action which is unprotected under the above provisions may also fall under the definition of coercion and duress in section 400 of the Workplace Relations Act, it may lead to heavy pecuniary penalties under section 407 of that Act.⁸⁴

The Committee emphasised that strikes can be prohibited under the Convention only in essential services in the strict sense of the term. That is, the interruption of which would endanger the life, personal safety or health of the whole or part of the population and for public servants exercising authority in the name of the State, in addition to the armed forces and police. The Committee concluded that:

... the prohibitions noted above with regard to multi-employer agreements, pattern bargaining, secondary boycotts and sympathy strikes, negotiations over 'prohibited content' that should otherwise fall within possible subjects for collective bargaining, danger to the economy, etc., go beyond the restrictions which are permissible under the Convention.⁸⁵

The Committee requested that the government indicate in its next report the measures taken or contemplated to bring the Workplace Relations Act into conformity with the Convention.

84. Section 400(1) prohibits industrial action with intent to coerce another person to agree to a collective agreement.

85. CEACR, *Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention*, 2007, op. cit.

The Committee also requested the government to report on measures taken or contemplated with a view to amending sections of the *Building and Construction Industry Improvement Act 2005* to eliminate excessive impediments, penalties and sanctions against industrial action in the building and construction industry.⁸⁶

Academic commentators have agreed that the Work Choices amendments, ‘while stopping just short of an outright ban on protected industrial action’ ‘substantially restricted the availability of protected industrial action.’⁸⁷

Other potential areas for change

The Howard Government initially delayed a response to the ILO’s criticisms of the 1996 reforms by arguing that its 2005 reforms had made the Committee of Expert’s assessment no longer strictly applicable.⁸⁸ Subsequent information provided by the Howard Government in 2007 has been assessed by the Committee as not having addressed most of its concerns. In relation to the right to strike, the Committee expressed its regret that the government had indicated that it was not intending to adopt amendments to relevant legislation as suggested by the Committee. However, it also noted that it had been informed by the Rudd Government following the November 2007 election that it was committed to making substantial amendments to the Workplace Relations Act.⁸⁹

As we will see below, closer scrutiny by the ILO is likely to uncover further grounds for objection to those noted above. To illustrate this point, the following analysis focuses on the mandatory secret ballot provisions of the Workplace Relations Act and their interaction with other provisions, as these new arrangements have not yet been subjected to ILO scrutiny. At a superficial level of analysis, mandatory secret ballots would not appear to infringe ILO principles. If asked, most members of the public and most union members would probably accept secret ballots as a reasonable requirement. They would likely support the philosophy that such ballots promote democratic process, protect union members from ‘coercion’ and protect society from ‘abuses of union power’. As we will see, however, the devil is well and truly in the detail of these arrangements. In examining the detail, the question must be asked: have these provisions, in their design and application, tipped the balance too far in the direction of employer interests by virtue of the constraints that are imposed on access to industrial action?

86. *ibid.*

87. McCrystal, ‘Shifting the Balance’, *op. cit.*, p. 197. Also see McCrystal, ‘Smothering the right to strike’, *op. cit.*; Fenwick and Landau, ‘Work Choices in international perspective’, *op. cit.*; Orr and Murugesan, *op. cit.*; White, *op. cit.*, pp. 66–80.

88. ILO, ILCCR: *Examination of individual case concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 and Convention No. 98, Right to Organise and Collective Bargaining, 1949 Australia (ratification:1973)*, 2006, p. 9, <http://www.ilo.org/ilolex/>, accessed 20 September 2007.

89. ILO, CEACR: *Individual observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Australia (ratification: 1973)*, 2008, <http://www.ilo.org/ilolex/>, accessed 13 June 2008.

The secret ballot provisions

Rationale for secret ballots

Advocates for secret ballots generally argue that if such ballots are required before industrial action is taken, a transparent process will be assured whereby employees can democratically decide whether to engage in industrial action to support collective bargaining.⁹⁰ According to this view:

... many strikes and other forms of industrial action either are not authorised by the rank and file or are approved by a 'show of hands' at stop work meetings. These meetings are often poorly attended by the rank and file and opposition to official union recommendations is difficult. On this perception, secret ballots would encourage more participation by rank and file union members and put a brake on union officials.⁹¹

In other words, the argument is that it is reasonable to impose conditions on the internal governance of unions in order to guard against undemocratic or oppressive behaviour which is detrimental to the rights of individuals or society at large.

As the Business Council's Study Commission noted, however, provision for the AIRC to order secret ballots had long existed in the Industrial Relations Act.⁹² Prior to 2005, it was open to either employers or union members to seek to have the provision brought into action, but it was rarely used.⁹³ This led the Hilmer Commission to conclude in 1991 that 'the secret ballot is not, in practice, a major priority for employers.'⁹⁴

Graeme Orr and Supiah Murugesan have suggested that in the context where secret ballots were not mandatory, there were a number of reasons why such provisions were little used. In particular, employers 'were uninterested in inflaming a dispute by seeking a ballot' and the AIRC 'believed a ballot would add little to their ultimate role of conciliating and arbitrating a compromise to the overarching dispute'.⁹⁵ Segments of union membership are also likely to be reluctant to bring attention upon themselves and their views by seeking a secret ballot.

90. See the object of Div 4 of Pt 9 of the *Workplace Relations Act 1996*.

91. See F. Hilmer, P. McLaughlin, D. Macfarlane and J. Rose, *Avoiding industrial action: A better way of working*, Business Council of Australia, Employee Relations Study Commission, Allen & Unwin, North Sydney, 1991, pp. 102–103. Note that Hilmer et al. state, rather than support, this view.

92. Sections 135 to 140 of the *Industrial Relations Act 1988*.

93. *Pre-industrial action secret ballots*, op. cit., pp. 11–13 provides further information on use of the provisions which enabled the AIRC to order secret ballots.

94. Hilmer et al, op. cit., p. 103. McCrystal notes that only eight applications for ballots were made to the AIRC from July 2001 to June 2005, see McCrystal, 'Smothering the right to strike', op. cit., p. 203, footnote 28. Indeed, Orr and Murugesan note that ad hoc secret ballots have long been available under federal laws going back to 1928. For further detail see Orr and Murugesan, op. cit., p. 274.

95. Orr and Murugesan, op. cit., p. 275.

Mandatory secret ballot provisions, by contrast, negate the reluctance of employees or parties external to the union to request a vote, as they ensure that ballots take place in all cases. This is not in itself a bad thing. However, the justification for the complex and onerous nature of the provisions that were enacted may be questioned, particularly given:

- the absence of any detailed evidence of abuses of union power used to support the 2005 proposals⁹⁶
- the historically low levels of industrial disputation prevailing at the time of the reforms, and since (see Appendix B) and
- the fact that industrial action is unlikely to be successful unless it is supported by the majority of relevant employees—a fact which places a firm, voluntary constraint on trade unions. In the absence of closed shop arrangements, unions which abuse this principle are likely to lose members—which again acts as a constraint.⁹⁷

Accessing protected action

In order to access protected action under the Workplace Relations Act, employees or their organisations must: first initiate a bargaining period; genuinely try to reach agreement; comply with any AIRC orders and directions; make application to the AIRC for a ballot order; take part in a compulsory, externally administered secret ballot (20 per cent of the cost of which must be borne by the applicant); achieve the necessary endorsement to meet the ballot requirements; give three days notice of their intention to engage in industrial action and comply with the wording on the ballot in relation to the industrial action taken. An application for a ballot cannot be made before the nominal expiry date of an existing agreement. Industrial action will not be protected unless it commences during a 30-day period beginning on the date of the declaration of the results of the ballot and occurs within the bargaining period. If another bargaining period is initiated later, and industrial action is proposed for that later period, it can only be authorised if a fresh application for a ballot order is granted and the other steps required by the Act are completed during that later period. Despite having successfully navigated through all these requirements, if persons who are not protected for the purposes of the industrial action (explained further below) take part in the action, then the industrial action loses its protected status.⁹⁸ Some commentators have suggested that the design of these arrangements appears ‘to be deliberately complex and bureaucratic.’⁹⁹

96. *ibid.*, p. 276.

97. *ibid.* This is confirmed by case studies in other countries which have shown that where unions propose strike action without following traditional union ballot procedures, members may feel they are not bound by the decision to strike and the legitimacy of the strike from the public perspective is also likely to come into question. Such factors have been found to limit the success of industrial action. See P. Hain, *Political strikes: The state and trade unionism in Britain*, Penguin Books, Middlesex, 1986, pp. 228–231 in relation to lessons learned from the 1984–1985 UK miners strike.

98. *Workplace Relations Act 1996*, sections 449–493.

99. Briggs, *op. cit.*, p. 180.

The following sections examine some of these requirements and their implications in further detail. Comparisons are also made with arrangements for secret ballots in the United Kingdom (UK), as the Howard Government made reference to the UK when justifying the introduction of secret ballots for Australia.¹⁰⁰ More detail of UK arrangements is provided at Appendix C.

Voting requirements

The ILO accepts ballot requirements to endorse industrial action, but has made it clear that the legal restrictions on the right to strike should not be excessive:¹⁰¹

... the ballot method, the quorum and the majority required should not be such that the exercise of the right to strike becomes very difficult, or even impossible in practice.¹⁰²

Authorisation of protected action under the Workplace Relations Act requires at least 50 per cent of persons listed on the roll of eligible voters to take part in the vote and more than 50 per cent of votes validly cast must approve the action.¹⁰³ While superficially an absolute majority seems reasonable, Fenwick and Landau argue that the ‘procedural burdens’ relating to voting requirements are ‘highly likely’ to be found to be in breach of international law.¹⁰⁴ Orr and Murugesan agree that there ‘is some force in this argument’, particularly in relation to postal ballots in large enterprises.¹⁰⁵ They cite the ILO’s Freedom of Association Committee, which has held that the:

... requirement of a decision by over half of all workers involved in order to declare a strike is excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises.¹⁰⁶

As Orr and Murugesan point out:

Even a national poll to elect representatives on the Republican question, via postal balloting, could not generate a 50% turnout.¹⁰⁷

100. For example, see Tony Abbott, Minister for Employment and Workplace Relations, Second reading speech: Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002, House of Representatives, *Debates*, 13 November 2002, pp. 8854–8855. Reference was also made to Canada. For information on secret ballot arrangements in Canada, see International and Intergovernmental Labour Affairs, Labour Branch, Human Resources and Skills Development, *Canada Labour Code (Part 1)*, Canada, January 1, 2006, <http://www.hrsdc.gc.ca/en/lp/spila/clli/irlc/fed-e.PDF>, accessed 5 June 2008.

101. Gernigon et al., op. cit., p. 11.

102. ILO Committee of Experts, quoted *ibid.*, p. 29.

103. *Workplace Relations Act 1996*, section 478.

104. Fenwick and Landau, op. cit., p. 142.

105. Orr and Murugesan, op. cit., p. 282.

106. Fenwick and Landau, op. cit., p. 281 citing ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th revised ed., ILO, Geneva, 2006, para. 548.

White has noted that the ballot requirements adopted are not only onerous, but may hide the true level of support for industrial action:

For protected strikes, it is now compulsory for unions and workers to comply with 45 sections of complex process requirements. The AIRC polices the process and the Australian Electoral Commission or a private agency conducts the ballot. Unions have to ensure a quorum of at least 50 per cent of eligible voters who must cast a vote, of which more than 50 per cent must approve the action. Only a simple majority of valid votes cast is warranted and indeed the quorum rule may hide the true level of support for the strike. For example, looking at votes in two workplaces of 100 employees, where in the first 49 employees in the ballot vote, all in favour of strike action and in the second, 50 employees vote, 26 of them in favour of strike action. In the first example, strike action would not be authorised, while in the second it would, even though it would appear that there was greater active support for the strike in the first workplace.¹⁰⁸

Postal ballots are the default position under the legislation and apply unless another method appears ‘more efficient and expeditious’. Despite the fact that attendance ballots have been affirmed by the Australian Electoral Commission (AEC) as generally being more expeditious than postal voting, the applicant must provide evidence on a case by case basis that an attendance ballot is preferable in the circumstances. If an attendance ballot is granted, such a ballot cannot take place during working hours. Further, as a default, the AEC must conduct the ballot, unless the AIRC is satisfied that another party is ‘fit and proper’ to conduct a fair, secret and expeditious vote. If the union is authorised to conduct the ballot, a suitable ‘independent adviser’ must be appointed to ensure the ballot is fair and democratic.¹⁰⁹ The latter undermines the underpinning philosophy of voluntary collective bargaining which is based on the parties taking primary responsibility for their bargaining processes and outcomes.

Providing access to a right to strike to union and non-union members

McCrystal argues that the complexity of the ballot provisions, combined with the fact that the cost of administering the ballot is divided between the Commonwealth (80 per cent) and the applicant (20 per cent), makes it extremely difficult for non-union employees to access protected action:

Without the administrative and financial resources of a trade union, employee negotiators will find it extremely difficult in larger businesses, to mobilise at least 50% of employees to participate in the ballot. Further, the imposition of 20% of the cost of such a ballot is likely to act as a strong disincentive to applying for a ballot order ... It is not unreasonable to suggest that the cost and difficulties associated with absolute majorities will combine to effectively prevent any protected action undertaken by non union actors in larger businesses, unless some assistance is provided by a trade union acting as a bargaining agent.¹¹⁰

107. Orr and Murugesan, op. cit., p. 282.

108. White, op cit., p. 71. Also see Sappey, et al., op. cit., p. 29.

109. Orr and Murugesan, op. cit., p. 278. Also see *Workplace Relations Act 1996*, sections 480 and 481.

110. McCrystal, ‘Shifting the Balance’, op cit., pp. 204–205.

Similarly, a joint state and territory government submission to a Senate inquiry on the legislation pointed to the practical difficulties for employees:

The secret ballot provisions are complex and prescriptive. The federal government assumes that someone in the workplace will have the capacity and the time to make the application to the AIRC, arrange for the conduct of the ballot with the [Australian] Electoral Commission and advise the Electoral Commission of the names of eligible voters. The [Act] does not entitle employees to any time off work to undertake these tasks, so employees will have to do this in their own time or seek permission from their employer to undertake the necessary steps in work time. This, together with having to pay 20 per cent of the cost of the ballot, is likely to be a major dampener on employees' willingness and capacity to take industrial action as part of the bargaining process.¹¹¹

While the procedural difficulties involved for unions are considerable, the difficulties for non-union employees are underlined by the fact that, as at 15 May 2008, there had been only one non-union ballot application made. Importantly, in that case the application was made with trade union support and assistance—so there have been **no** non-union ballot applications made by employees alone.¹¹²

Opportunities to intervene

The procedural complexity of the protected action and secret ballot provisions is not limited to voting requirements. As Alex Bukarica has pointed out, the majority of secret ballot applications under the Work Choices scheme have been strenuously opposed by employers for failure to comply with various requirements of the legislation. In particular, employers have opposed ballot applications on the basis that:¹¹³

- the union was not in a validly-initiated bargaining period
- the form of industrial action specified in the ballot questions was insufficiently specific
- the applicant for a ballot had not genuinely tried to reach agreement, including because
 - the pursuit of ‘prohibited content’ (such as a provision not pertaining to the employment relationship) suggests that the union is not genuinely attempting to reach agreement with the employer or

111. Submission to the Senate Employment, Workplace Relations and Education Legislation Committee Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005 on behalf of the Governments of New South Wales, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory, 9 November 2005, p. 11, cited by Sapprey et al., *op. cit.*, p. 29.

112. *Canning v Fremantle Port Authority* (2008) AIRC 309. Advice provided by S. McCrystal to J. Romeyn, email 15 May 2008.

113. A. Bukarica, ‘Secret ballot: applications under the Workplace Relations Act’, *Law Society Journal*, February 2007, pp. 75–76. Also see CCH, *Labour Law Reporter*, Industrial Action, especially para. 45–559; and Orr and Murugesan, *op. cit.*, pp. 286–292.

- claims were ‘fanciful’ and did not suggest realistic movement from opening positions expected during bargaining¹¹⁴ or
- negotiations have not been exhausted¹¹⁵
- the claims amounted to pattern bargaining.

The result is that ballots take weeks and sometimes months to arrange:

Hearing an application, compiling the roll and conducting a postal vote and tallying votes are matters that even if smoothly run must take several weeks. Where an employer contests the application from many angles ... the initial application process alone can take many weeks. Where the employer appeals to a Full Bench, the process can take several months.¹¹⁶

Despite the length of time that it may take unions and employees to navigate the requirements of the legislation, once endorsed by an absolute majority of relevant employees, there is only a relatively short window of opportunity in which protected industrial action can occur. Industrial action will not be protected unless it commences during a 30-day period beginning on the date of the declaration of the results of the ballot.

Splitting the workforce

Where unions negotiating a collective agreement do successfully navigate the requirements of the secret ballot provisions of the legislation and industrial action is authorised, further problems may arise. First, the effectiveness of protected action will be reduced by the interaction of the ballot and bargaining period provisions. This is because the scheme embodied in the Workplace Relations Act effectively precludes union and non-union employees taking industrial action together in support of common claims for a single agreement. As McCrystal points out:

... if protected industrial action is authorised, only union members may engage in that action. **Non-member employees, who will ultimately be bound by the collective agreement if it is passed, cannot support the proposed agreement through protected industrial action.** Further, if non-union employees do take industrial action in those circumstances, the whole action is put at risk if the organisation is found to have acted ‘in concert’ with unprotected persons.¹¹⁷ (Emphasis added.)

Non-union members may make an application for a secret ballot to authorise industrial action, but only where they have initiated a bargaining period in support of a non-union agreement. This means that the only way that union and non-union employees can join together in industrial action in support of a common enterprise agreement is by seeking to

114. *AMWU v VisyPak Operations Pty Ltd* (2007) 59 AILR para. 100–580. Also see J. Catanzariti and S. Brown, ‘Major tribunal decisions in 2007’, *Journal of Industrial Relations*, 50 (3), June 2008, pp. 432–433.

115. This argument has been rejected by the AIRC, see Bukarica, op. cit., p. 76.

116. Orr and Murugesan, op. cit., pp. 277–278.

117. McCrystal, ‘Smothering the Right to Strike’, op. cit., p. 204.

negotiate a non-union agreement.¹¹⁸ The apparent incentive in the design of the scheme towards promoting non-union bargaining may be viewed by the ILO as inconsistent with Australia's obligations in relation to freedom of association.

Secondly, as Fenwick and Landau emphasise, industrial action which has otherwise met all the requirements for protected action will be liable to common law sanction if unprotected persons become involved:

... where industrial action involves persons who are not protected for the purposes of that industrial action, all of the industrial action will be invalidated, rendering even those negotiating parties whose actions would otherwise have been lawful vulnerable to sanction under the common law (s 438).¹¹⁹

One wonders why the scheme has been designed in this way, if not to weaken support for union bargaining and create an incentive for non-union bargaining. If mandatory secret ballots are justified to protect individuals from being 'coerced' to join industrial action, why should non-union members who voluntarily decide to join union initiated action at their workplace be precluded from so doing? Similarly, why should action by unions and their members be tainted by the activities of non-union members (and thus liable to common law sanctions and other penalties) if it is in support of common claims at the same workplace? Indeed, what power does the union have to prevent non-members from joining union-initiated industrial action?

Interaction with other provisions

As noted above, when compared to the constraints on employee and union initiated industrial action, employer access to industrial action associated with collective bargaining remains relatively unfettered. Employers are only required to give the required notice (at least three working days written notice during a bargaining period) and genuinely try to reach agreement before they can access protected action.¹²⁰

Other aspects of the Work Choices reforms effectively enabled employers to end agreements unilaterally after they expired and negotiate new agreements from the relatively low base of the Australian Fair Pay and Conditions Standard and any protected award conditions.¹²¹ Such action by an employer is sometimes referred to as a 'partial lockout' in other jurisdictions.¹²² However, under the Work Choices scheme unilateral termination of an agreement was not defined as employer industrial action. This meant that employees were not entitled to take industrial action in response to the employer's action without first going through a secret ballot process, but they were not able to make an application for a ballot before the nominal expiry date of the existing agreement. These arrangements made employees vulnerable to employer action to terminate their collective agreement before they could initiate the long and complex processes necessary to access protected action. As such, they undermined the

118. Advice provided by S. McCrystal to J. Romeyn by email, 15 May 2008.

119. Fenwick and Landa, *op. cit.*, p. 142.

120. Briggs, *op. cit.*; McCrystal, *op. cit.*, p. 209; Sappey et al., *op. cit.*, p. 30; White, *op. cit.*, p. 72.

121. I. Ross, *Bargaining Under Work Choices*, Lexis Nexis Butterworths, Australia, 2006, p. 38.

122. States and territories submission to Senate enquiry, cited by Sappey et al., *op. cit.*, p. 14.

bargaining position of employees, tipping the balance of power squarely in favour of the employer.

As noted below, passage of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* removed the provisions which allowed either party to terminate a collective agreement unilaterally after its nominal expiry date had passed.

Ballot outcomes

Following the passage of the 2005 amendments, Andrew Stewart speculated that:

Given the hurdles that must now be overcome by those who wish to take protected action, and the ease with which employers (or affected third parties) may be able to get lawful action stopped, it remains to be seen how many unions will bother to comply with the Act at all.¹²³

However, figures published by the AIRC show that during 2006–07, 271 protected action ballot applications were made, of which 182 were granted.¹²⁴ The AIRC has noted that there has been no follow-up research in relation to ballots and the bargaining process, but observed that ‘[a]necdotal reports suggest that very few ballots yield a vote against protected action.’¹²⁵

Orr and Murugesan also observed that few ballots are lost and indeed, approval rates are ‘remarkably high’. They refer to research based on data drawn from the AIRC’s public records which suggests that ballots are being approved with average majorities of between 88.6 per cent and 94.3 per cent. As they explain, the lower and upper ranges reflect the fact that many individual ballots involve multiple questions, some attracting more support than others.¹²⁶

Possibly an unintended result of the ballot scheme, is the use of ballots as a strategic bargaining tactic by unions. Initiating the bargaining process signals the union’s resolve and approval of industrial action by members signals their determination to the employer. While there has been no research in Australia into the extent to which industrial action occurs following approval by ballot, it may be that the ballot outcome is itself a factor that encourages employers to make concessions.¹²⁷ Certainly, research in the UK has found that a successful ballot increases the union’s bargaining power without the necessity for industrial action (see Appendix C). This may explain why there have been a significant number of

123. A. Stewart, ‘Work Choices in overview: big bang or slow burn?’, *The Economics and Labour Relations Review*, 16 (2), May 2006, p. 43.

124. Australian Industrial Relations Commission, *Annual Report of the President of the Australian Industrial Relations Commission*, Commonwealth of Australia, 2007, p. 9. Examination of the declaration of result statements published by the AIRC confirms this view; see <http://www.airc.gov.au/dispute/ballots.htm>, accessed 9 May 2008.

125. *ibid.*

126. Orr and Murugesan, *op. cit.*, pp. 293–294 and footnote 138. Also see D. Peetz, *Assessing the impact of ‘WorkChoices’—one year on*, Report to the Department of Innovation, Industry and Regional Development, Victoria, March 2007, p. 74.

127. Orr and Murugesan, *op. cit.*, p. 294.

applications since 2005, despite speculation that the hurdles were so great that unions might not bother to comply with the Act's ballot provisions.

Assessment and comparisons

Clearly, the secret ballot provisions are not so onerous as to make access to protected action **impossible** for unions and their members (as there were 182 successful applications in 2006–07 alone). However, access for non-union employees is a different story. It remains to be seen whether the ILO will regard the secret ballot provisions as so difficult and burdensome as to infringe its principles regarding freedom of association and the right to strike. Whatever the ILO's decision, however, the need for simpler, less burdensome and more balanced procedures is evident.

More streamlined procedures supplemented by clear guidance material would be consistent with protection of the right of individual union members to a democratic approval process. They would also ensure that union and tribunal (and therefore public) resources are not channelled into time consuming, costly, litigious processes of limited practical benefit. Further research could usefully consider whether the cost and delay associated with the imposition of complex ballot procedures can be justified in terms of an improvement in democratic process and outcomes. However, some specific amendments that might be considered include:

- restricting the ability of employers to intervene in the pre-ballot process¹²⁸
- enabling the decision to take industrial action to be based on a simple majority of valid votes cast—as applies in the UK and Canada¹²⁹
- enabling the conduct of the strike vote to be the union's responsibility, but requiring the union by law to comply with clear and simple statutory conditions to ensure that the vote is confidential, timely, and fairly conducted.¹³⁰ As a variant of this approach, the provisions might require a union to appoint a scrutineer to assist the conduct of the ballot only in large workplaces—as occurs in the UK in relation to workplaces with more than 50 employees
- limiting by short time frames any challenge to the validity of the vote which seriously calls into question the decision of the majority¹³¹
- removing the provisions which invalidate what would otherwise be protected action where non-union employees voluntarily participate in industrial action endorsed by union members in support of a common collective agreement at the same workplace

128. *ibid.*, p. 294; and *Seeking a balance*, op. cit., Chapter 8.

129. Orr and Murugesan, op. cit., p.294 and 279; and *Canada Labour Code (Part 1)*, op. cit.

130. As in Canada, see *Seeking a balance*, op. cit., Chapter 8.

131. *ibid.*

- or recognising single bargaining units to enable all employees in a workplace who are negotiating a collective agreement at the enterprise to be balloted and take industrial action in support of such an agreement
- enabling the relevant tribunal greater discretion in determining whether the period in which protected action may be taken should be extended.

Recent developments

One of the earliest actions of the Rudd Labor Government was the passage of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*, which removed access to new AWAs, but created a new form of individual agreement for an interim period (the Individual Transitional Employment Agreement or ITEAs). The amendments also clarified that employees on ITEAs (and existing AWAs) that have passed their nominal expiry dates would be able to make and approve proposed collective agreements and be eligible to take part in ballots for protected industrial action. A no-disadvantage test for individual and collective agreements was also reintroduced. In addition, the amendments removed the provisions that allowed either party to unilaterally terminate a collective agreement after its nominal expiry date had passed. They instead allowed the AIRC to terminate such an agreement on application, if it was satisfied that the termination would not be contrary to the public interest. The amendments also introduced a new Part to deal with award modernisation.

The removal of AWAs and the reintroduction of a no-disadvantage test are important steps towards a fairer collective bargaining system which have been publicised widely. Removing the provisions that allowed either party to unilaterally terminate a collective agreement once it had passed its nominal expiry date is also an important change for the reasons outlined above.

The Rudd Government has indicated its intention to make further substantial revisions to the Workplace Relations Act by 2010. Limited change is suggested in the area of industrial action and change in that area is likely to meet strong opposition from employer organisations.¹³² However, some of the statements in the ALP's pre-election policy, *Forward with fairness* (April 2007) and the related *Forward with fairness: Policy implementation plan* (August 2007) suggest possible changes of relevance. These would apply particularly in relation to:

- The introduction of a legislated requirement to bargain in good faith—which could reduce the need for industrial action to bring a reluctant employer to the negotiation table.
- The inclusion of flexibility clauses in collective agreements—which could provide scope for flexibilities to reduce tensions which might otherwise undermine agreements.
- Pattern bargaining will continue to be outlawed, however, multi-employer collective bargaining may be facilitated by Fair Work Australia for 'low paid employees or

132. For a summary of the position of employer organisations on this and other reform issues, see B. Mackinnon, 'Employer matters in 2007', *Journal of Industrial Relations*, 50 (3), June 2008, pp. 463–474.

employees who have not historically had access to collective bargaining, such as in community services, cleaning and childcare industries.’¹³³ This may go a small part of the way towards addressing the ILO’s concerns regarding limitations on the level of bargaining and associated strike action. However, it is not yet clear how multi-employer bargaining for low paid employees will work and in particular, whether a right to strike will be available to support such bargaining. Workers in the nominated industries tend to be characterised by limited market power and the inability to use industrial action in support of multi-employer bargaining would compound their disadvantage. If access to industrial action is not to be available to support such bargaining, then the parties should be compensated by the provision of adequate impartial and speedy conciliation and arbitration procedures.

- Mandatory secret ballots are to be retained, but the policy states that they will be ‘conducted in workplaces’ which suggests that postal ballots may not continue to be the default. While silent on the detail of arrangements, the *Policy implementation plan* states that a secret ballot should be ‘the means of determining the views of employees about taking protected industrial action, **not a way of frustrating or delaying the action**’ (emphasis added). It also states that the ‘**ballot process will be fair and simple**, and will be supervised by Fair Work Australia’¹³⁴ (emphasis added). This suggests recognition of the need to reduce the complexity of the current arrangements and achieve a fairer balance for employees and their representatives.

The *Forward with fairness* policy statement indicates that employers ‘may take protected industrial action including locking out employees **in response** to industrial action by those employees’¹³⁵ (emphasis added). This suggests some support for reform in this area of the type which has been argued strongly by Briggs. He suggested a number of changes designed to balance more fairly the bargaining power of employers and employees, including:

- prohibiting offensive lockouts and those against non-union employees
- enhancing the power of the AIRC [or its replacement] to terminate long-running lockouts and to settle such entrenched disputes equitably
- ensuring that access to lockouts is provided in a way which does not undermine the ability of employees to associate freely, access union representation and bargain collectively.¹³⁶

It is beyond the scope of this paper to examine the case for and against multi-employer or industry bargaining, despite the implications of that debate for the right to strike. In the current context in which there is widespread concern over inflationary pressures, it is unlikely that the Rudd Government will loosen the constraints on multi-employer bargaining beyond those noted above. However, in the longer term, there may be some value in a rigorous examination of this issue. Such a study could consider whether providing some further scope for and legislative recognition of multi-employer or industry bargaining would be beneficial

133. *Forward with fairness*, April 2007, op. cit., p. 14.

134. *Forward with fairness: Policy implementation plan*, op. cit., p. 21.

135. *Forward with fairness*, April 2007, op. cit., p. 16.

136. See Briggs, op. cit., pp. 167–185.

in light of the changing nature of work and in particular, the fact that the workforce is more mobile now than it has been in the past. In this context, some academics have suggested that new models of employee representation and more corporatist models of bargaining may be required to address issues such as industry restructuring, industry training arrangements and portability of benefits.¹³⁷

Conclusions

The continued need for collective bargaining, at least at the level of the workplace and enterprise, has not been seriously questioned. It is supported by all major political parties, employer associations and employee organisations. However, limited attention has been paid to the necessary requirements of stable collective bargaining systems, including the importance of a right to strike. A poorly understood characteristic of collective bargaining is that stable collective bargaining relationships are dependent on reasonably even power bases existing between the parties and a defined right to strike (and limited rights to lockout) have an important role to play in this regard.

This paper has outlined the major legislative developments relating to the right to strike in the federal sphere since 1993, with particular reference to the 1996 and 2005 reforms implemented under the Workplace Relations Act. It has summarised the response of the ILO to those reforms, considered the secret ballot provisions in more detail and overviewed assessments made by academics and other commentators.

The overwhelming finding from this analysis is that the legislative framework no longer strikes an appropriate balance between worker, management and broader social interests so far as the regulation of industrial action is concerned. Changes implemented in 2008 have commenced the process of re-establishing that balance and the ALP's pre-election policy suggests some further scope for change. However, there is a case for a thorough review of what has become a complex and onerous set of provisions that are designed to impede and impair, rather than provide access to a right to strike. The impact and implications of these provisions can only be understood by closely examining the interaction of multiple provisions throughout different parts of the legislation. In reviewing and revising these provisions it is essential that policy makers have regard to:

- the requirements of stable, voluntary collective bargaining systems
- the need to strike a fair balance between the interests of workers, employers and the public—not destabilising the system by swinging the pendulum too far in favour of the public, employers or workers
- the need to avoid unnecessary regulatory burden and complexity with its associated costs for organisations and the community.

137. For example, K. Stone, *From widgets to digits: Employment regulation for the changing workforce*, Cambridge University Press, New York, 2004; and B. Aaron and K. Stone, *Rethinking comparative labor law: Bridging the past and future*, Vandeplas Publishing, Florida, 2007.

In ensuring that a fair balance is struck between the interests of the parties and those of the broader public, the conventions established by the ILO through its tripartite processes, and the principles established by its supervisory bodies in interpreting the application of those conventions, can provide useful guidance. The right to strike as recognised by the ILO is not absolute and may be subject to a range of legal conditions, restrictions and prohibitions. These conditions have been designed to balance competing interests whilst ensuring that the preconditions for stable collective bargaining are met. A legislative framework which finds a fair balance between workers' and employers' interests, social and economic considerations, rights and responsibilities, individual and democratic rights and the requirements of voluntary collective bargaining will provide a stable, lasting foundation for encouraging mutually beneficial and cooperative relations.

Appendix A: Glossary of terms

Award restructuring

A process established in 1987 which involved the simplification of awards by removing outdated and complex classifications and the modernisation of awards by the inclusion of provisions on training and career paths.

Bargaining power

Bargaining power has been defined as the ability of one party to inflict costs onto another in an attempt to bring about attitudinal change.¹³⁸ It is an important determinant of the terms of exchange achieved by bargaining parties.

Certified or collective agreements

Agreements (union and non-union) approved by the Australian Industrial Relations Commission prior to the Work Choices amendments were referred to as ‘certified agreements’. Following the Work Choices amendments they became ‘collective agreements’.

Closed shop (or union shop)

A workplace where an agreement between the union and the employer requires the employer to engage only union members or persons who agree to join the union within a specified period of time.

Corporatist bargaining

Corporatism gives government recognition to major economic and interest organisations by granting them a major voice in policy making in return for their cooperation. Corporatist bargaining involves economic and interest organisations participating in the negotiation of matters such as wages and incomes policies. Corporatist approaches were common in Western Europe and played a role in Australia in the 1980s (for example, the Accord-based wages system and specific industry restructuring plans).¹³⁹

Corporations power

The provision of the Australian Constitution which gives the federal government the power to make laws related to foreign corporations and trading and financial corporations formed in Australia (section 52(xx)). Used in more recent years—together with other Constitutional powers—as a foundation for the federal workplace relations system.

138. B. Dabscheck and J. Niland, *Industrial Relations in Australia*, George Allen & Unwin, Sydney, 1981, p. 19.

139. B. Head and S. Bell, ‘Understanding the modern state: Explanatory approaches’, in S. Bell and B. Head (eds.), *State, Economy and Public Policy in Australia*, Oxford University Press, Melbourne, 1994, p. 55.

Enterprise bargaining

Bargaining at the level of the workplace or enterprise with or without the involvement of a trade union.

Industrial action

A refusal to undertake or provide work that would otherwise be performed under an employment contract, including by strikes or work bans by employees or lockouts by employers.

Interest/rights disputes

Interest disputes concern the making of a new agreement, or changes to an existing agreement in relation to a matter not covered by the agreement. They may be distinguished from rights disputes which arise out of the interpretation of the provisions of an existing agreement which establishes employee rights for a period of time.

Lockout

A lockout occurs when an employer temporarily withdraws paid work for its employees, refusing to allow them to enter the workplace. The employer may use this tactic as part of a strategy to exert economic pressure on employees to cause them to yield in an industrial dispute.¹⁴⁰

Managerial prerogatives

The right of management to make unilateral decisions over certain issues considered to be beyond the scope for bargaining. The limits of such prerogatives are not fixed and tend to change over time as social attitudes change.

No disadvantage test

A test that required the regulatory authorities (such as the Australian Industrial Relations Commission and the Employment Advocate) to examine the conditions set down in an agreement (individual or collective) to ensure that its terms and conditions did not disadvantage employees when compared with conditions under previously applying regulatory arrangements.¹⁴¹

140. Briggs, op. cit., pp. 167–168.

141. For the history of the no disadvantage test see R. Mitchell, R. Campbell, A. Barnes, E. Bicknell, K. Creighton, J. Fetter and S. Korman, *Protecting the worker's interest in enterprise bargaining: The 'no disadvantage' test in the Australian federal jurisdiction—final report*, prepared for the Workplace Innovation Unit, Industrial Relations Victoria, University of Melbourne, <http://cclsr.law.unimelb.edu.au/partnerships-at-work/NDT%20FINAL%20REPORT.pdf>, accessed 12 May 2008.

Nominal expiry date

The nominal expiry date of workplace agreements is defined in section 352 of the *Workplace Relations Act 1996*. It is the date specified in a workplace agreement as its expiry date, provided that date is no later than the fifth anniversary of the date on which the agreement was lodged. If the date specified is later than the fifth anniversary, then the nominal expiry date becomes the fifth anniversary of the date on which the agreement was lodged. The nominal expiry date of an employer greenfields agreement can be no later than the first anniversary of the date on which the agreement was lodged.

Offensive lockouts

Lockouts that precede industrial action by employees (as distinct from ‘defensive’ lockouts which occur in response to industrial action by employees).¹⁴²

Pattern bargaining

Pattern bargaining is a trade union strategy which has been used over a long period across a number of countries. It can involve a trade union securing a new and superior entitlement from one employer by agreement and then using that agreement as a precedent to demand the same entitlement or a superior one from another employer(s). However, it may also involve unions seeking to establish common conditions across agreements in recognition of the mobility of their members and the fact that their members may be performing similar work within an industry or occupation. The *Workplace Relations Act 1996* defines pattern bargaining as a course of conduct by a negotiating party in respect of two or more proposed collective agreements. That course of conduct must extend beyond a single business and involve seeking common wages or conditions for two or more proposed agreements.

Picketing

Picketing is a form of industrial action in which those involved generally gather outside a place of work as a form of protest. They may attempt to persuade or stop others (such as non-union members or suppliers) from entering the place of work (or ‘crossing the picket line’) or they may merely seek to publicise their cause. The latter may be designed to put pressure on an employer through adverse publicity.

Productivity arbitration

A process akin to productivity bargaining in which an arbitrator requires employees to adopt more productive work practices in return for improved wages and conditions.

Protected industrial action

Industrial action which is protected by statutory provisions from judicial action which might otherwise be taken at common law (for example for breach of contract).

142. Briggs, op. cit.

Restrictive work practices

Work practices which restrict the potential for productivity improvement. Where such practices have been established by employees through de facto work rules as a result of custom and practice, management's ability to change such work practices unilaterally may be limited.

Secondary boycott

A situation where a union places an employer or organisation under duress so as to win concessions from another employer or organisation, for example, by making it impossible to supply the employer being targeted.¹⁴³ A secondary boycott generally occurs where a union which is negotiating with an employer (the first employer) calls on other unions or its own members engaged by another employer(s) to undertake industrial action in support of claims against the first employer. Some regard such action as imposing unacceptable constraints on the operation of the market and also unfairly involving third parties in disputes in which they have no direct interest as they do not have a place at the negotiation table.

Strikes

Strikes are a form of industrial action. They involve a stoppage of work (which distinguishes them from go-slows or overtime bans). It is a temporary stoppage of work as employees expect to return to work for the same employer after the strike is over. A strike is a collective act involving a group of employees. It is generally a calculative act in that it is designed to express grievances, seek a solution to problems, apply pressure or enforce demands.¹⁴⁴

Sympathy strikes (also see secondary boycott and picketing)

A sympathy strike occurs where one union strikes in support of another, even though the union is not a party to negotiations with the employer. Refusing to cross a picket line is a common form of sympathy action.

Trade union

An organisation of employees formed to protect and advance the common interests of its members in improving the terms and conditions of their employment.

143. Bray et al., op. cit., p. 133.

144. R. Hyman, *Strikes*, 4th ed., Macmillan, London, 1989.

Appendix B: Trends in industrial disputation

Analysis of industrial dispute data shows that a significant fall in the number of disputes, the total working days lost to disputes and the working days lost per employee occurred during the 1980s. The decline continued during the 1990s and through the current decade so that by 2007 industrial disputation was the lowest on record (see table and figures below for further detail).

The dramatic fall in industrial disputation which occurred through the 1980s and 1990s is in some senses surprising given that 1993 saw the introduction of a right to strike and the period since the late 1980s witnessed a shift away from centralised wage determination and a move to greater enterprise bargaining. These are circumstances which many observers may have predicted would produce an increase in industrial disputation.

A number of commentators have examined the reasons for the decline in industrial action. In relation to the initial decline, Woden has argued that:

While the decline in strike levels has not been unique to Australia, it is difficult to escape the conclusion that the Accord policy which operated between the federal Labor Government and the ACTU between 1983 and 1995 was responsible for much of the decline ... the hypothesis that the Accord years were responsible for a marked decline in disputation levels that cannot be explained by other economic or institutional phenomena receives strong support from econometric research ...¹⁴⁵

Relatively high levels of unemployment and the structural decline of the manufacturing sector have been identified as probable causes of the continued decline in industrial disputation during the 1990s.¹⁴⁶

Despite the demise of the Accord, an improved labour market and a legislated right to strike, industrial disputation continued to fall through the first decade of the 21st century. A number of **possible** explanations have been proposed for this trend, which has occurred not only in Australia, but also across many other developed countries.¹⁴⁷ These explanations include:

- A cultural shift away from traditional adversarial relations to more cooperative approaches between management and workers, perhaps associated with enterprise bargaining.¹⁴⁸
- Rising living standards, more stable economic conditions, the fall in trade union membership, displacement of strike activity by alternative dispute resolution and globalisation distancing workers from the source of decision-making.¹⁴⁹

145. Woden, op. cit., pp. 16–17, citing research by Beggs and Chapman, and Morris and Wilson.

146. Bray et al., op. cit.' p. 311.

147. See *Seeking a balance*, op. cit., Chapter 2, for information on strike trends in Canada.

148. Chapman, quoted in Woden, op. cit., p.17.

149. For figures showing the decline in union membership and density see D. Oliver, 'Australian unions in 2007', *Journal of Industrial Relations*, 50(3), June 2008, pp. 448–449. Also see K. Ewing, 'Laws against strikes revisited' in C. Barnard, S. Deakin and G. Morris (eds.), *The*

- The concept of ‘protected industrial action’ requires careful planning and notice and may have had a ‘psychological effect on both labour and management.’ ‘Most unions now tend to think about organising industrial action only when it can be protected.’ As a result, it is less common for disputes to ‘erupt’ and where they do, they are generally the product of spontaneous activity by workers, rather than union endorsed action.¹⁵⁰
- The increasing difficulty of accessing protected industrial action due to the constraints imposed and the enhanced sanctions for illegal strike activity, combined with a change in union strategy against a background of declining union membership.¹⁵¹
- The growth of the service sector has ‘generated a new workforce with little or no historic association with organised representation.’ This, combined with other structural changes in business organisation and greater reliance on employing women, younger workers and part-time and casual employees has been said to encourage labour relations to move towards the ‘individual system’ and away from bargaining—with a consequent decline in industrial disputes.¹⁵²
- Where industrial discontent persists, it is being manifested in more individual forms, such as absenteeism and labour turnover.¹⁵³

Future of Labour Law: Liber Amicorum Bob Hepple QC, Hart Publishing, Oxford, 2004, p. 42, quoted in Orr and Murugesam, op. cit., p. 285.

150. Creighton and Stewart, op cit., pp. 154 and 537.

151. Woden, op. cit., and Peetz, op. cit., p. 74.

152. L. Troy, *Beyond unions and collective bargaining*, M.E. Sharpe, New York, 1999, pp. 38–39 commenting on similar trends in the USA.

153. Bray et al., op. cit., p. 315.

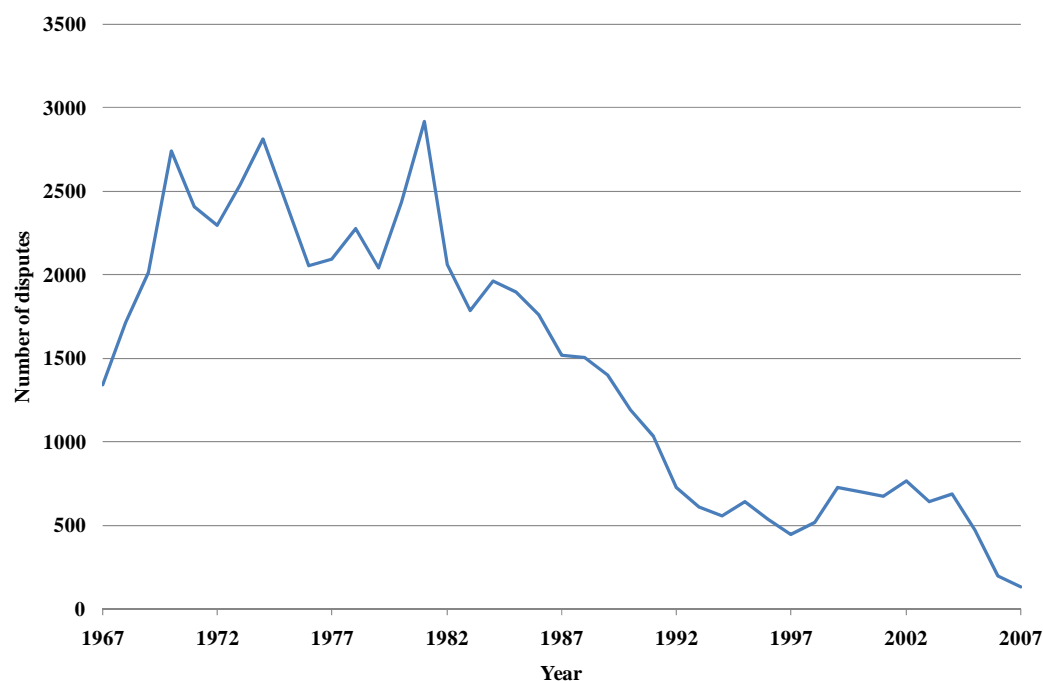
Table B1: Industrial disputes in Australia, 1967 to 2007

Calendar year	Number of disputes which occurred during the year	Workers involved directly and indirectly ('000)	Working days lost ('000)	Working days lost per employee
1967	1340	482.3	705.3	0.176
1968	1713	720.3	1079.5	0.261
1969	2014	1285.2	1957.9	0.458
1970	2738	1367.4	2393.8	0.555
1971	2404	1326.5	3068.5	0.693
1972	2298	1113.8	2010.3	0.449
1973	2538	803.0	2634.6	0.570
1974	2809	2004.8	6292.3	1.320
1975	2432	1398.0	3510.1	0.742
1976	2055	2189.9	3799.1	0.803
1977	2090	596.2	1654.9	0.350
1978	2277	1075.6	2130.7	0.432
1979	2042	1862.9	3964.3	0.785
1980	2429	1172.6	3319.8	0.649
1981	2915	1247.2	4189.3	0.797
1982	2060	706.1	1980.4	0.358
1983	1787	470.2	1641.5	0.249
1984	1965	560.3	1307.4	0.248
1985	1895	570.5	1256.2	0.223
1986	1761	691.7	1390.7	0.238
1987	1519	608.8	1311.9	0.219
1988	1508	894.4	1641.4	0.265
1989	1402	709.8	1202.4	0.184
1990	1193	729.9	1376.5	0.207
1991	1036	1181.6	1610.6	0.250
1992	728	871.5	941.2	0.147
1993	610	489.6	635.8	0.100
1994	560	265.1	501.6	0.075
1995	643	344.3	547.6	0.079
1996	542	577.4	928.7	0.132
1997	447	315.4	534.2	0.075
1998	520	348.4	526.3	0.072
1999	731	461.2	650.6	0.087
2000	700	325.4	469.1	0.061
2001	675	225.7	393.1	0.050
2002	767	159.7	259.0	0.033
2003	643	275.6	439.4	0.054
2004	692	194.0	379.8	0.046
2005	472	241.0	228.3	0.026
2006	202	122.7	132.6	0.015
2007	135	36.0	49.7	0.005

Source: B. Dabscheck, 'The arbitration system since 1967', in S. Bell and B. Head (eds.), *State, Economy and Public Policy*, Oxford University Press, Melbourne, 1994; and ABS, *Industrial Disputes, Australia*, electronic delivery, ABS Cat. No. 6321.0.55.001.

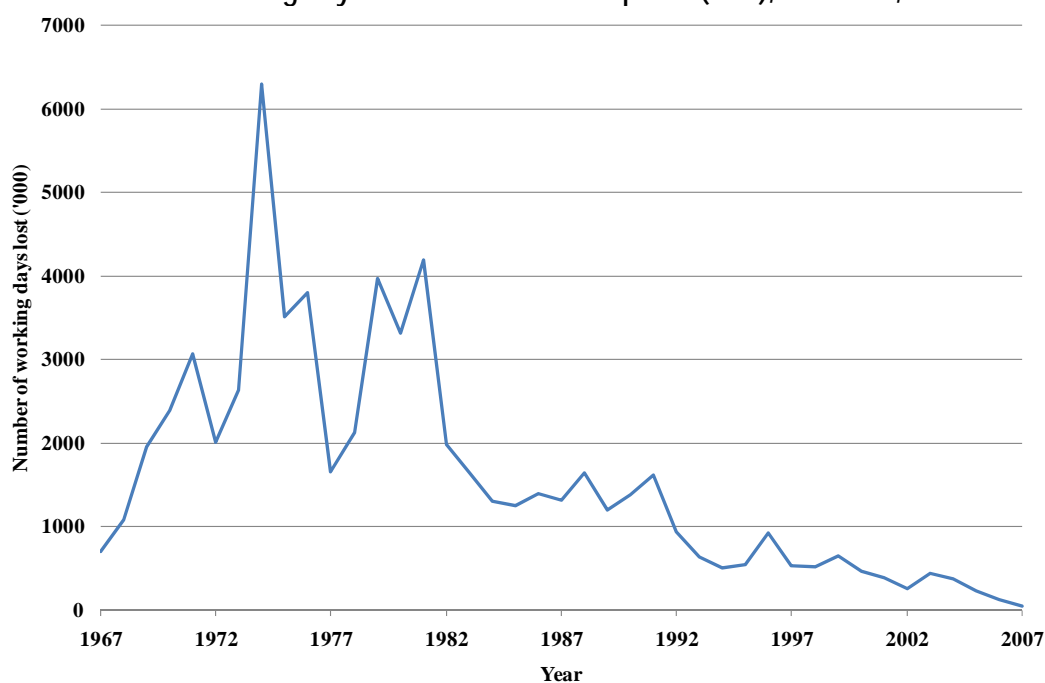
Note: The Australian Bureau of Statistics collects statistics in relation to disputes involving stoppages of work of ten working days or more at the establishments where the stoppage occurred. Ten working days is equivalent to the amount of ordinary time worked by ten people in one day, regardless of the length of the stoppage, for example, 3000 workers on strike for two hours would be counted as 750 working days lost (assuming an eight hour working day).

Figure B1: Number of industrial disputes, Australia, 1967 to 2007



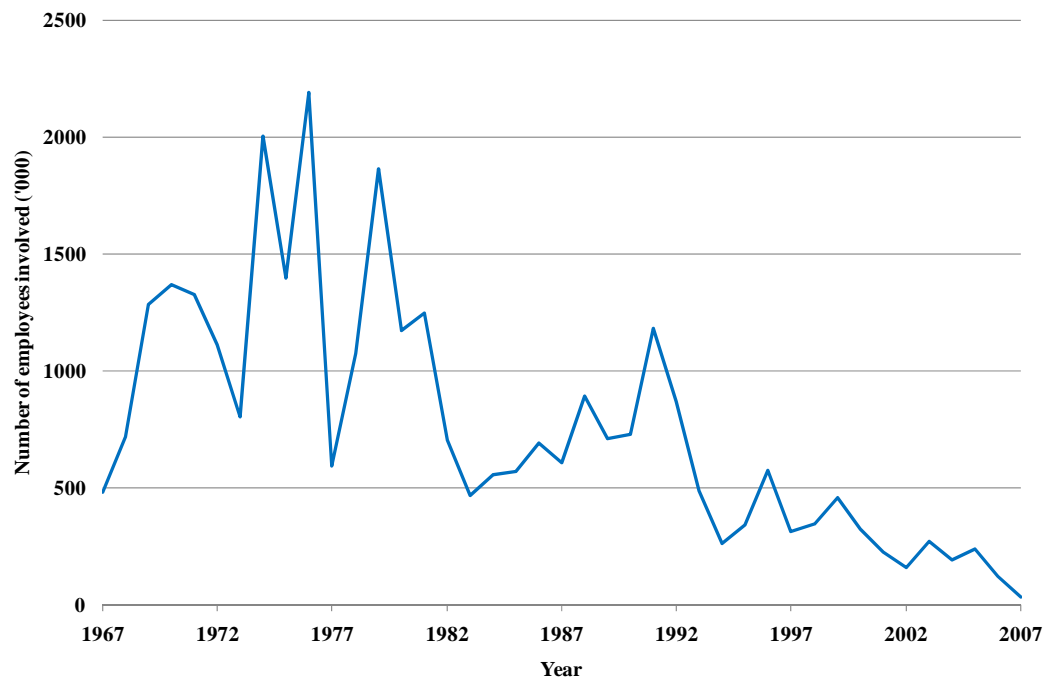
Source: B. Dabscheck, 'The arbitration system since 1967', in S. Bell and B. Head (eds.), *State, Economy and Public Policy*, Oxford University Press, Melbourne, 1994; and ABS, *Industrial Disputes, Australia*, electronic delivery, ABS Cat. No. 6321.0.55.001.

Figure B2: Number of working days lost to industrial disputes ('000), Australia, 1967 to 2007



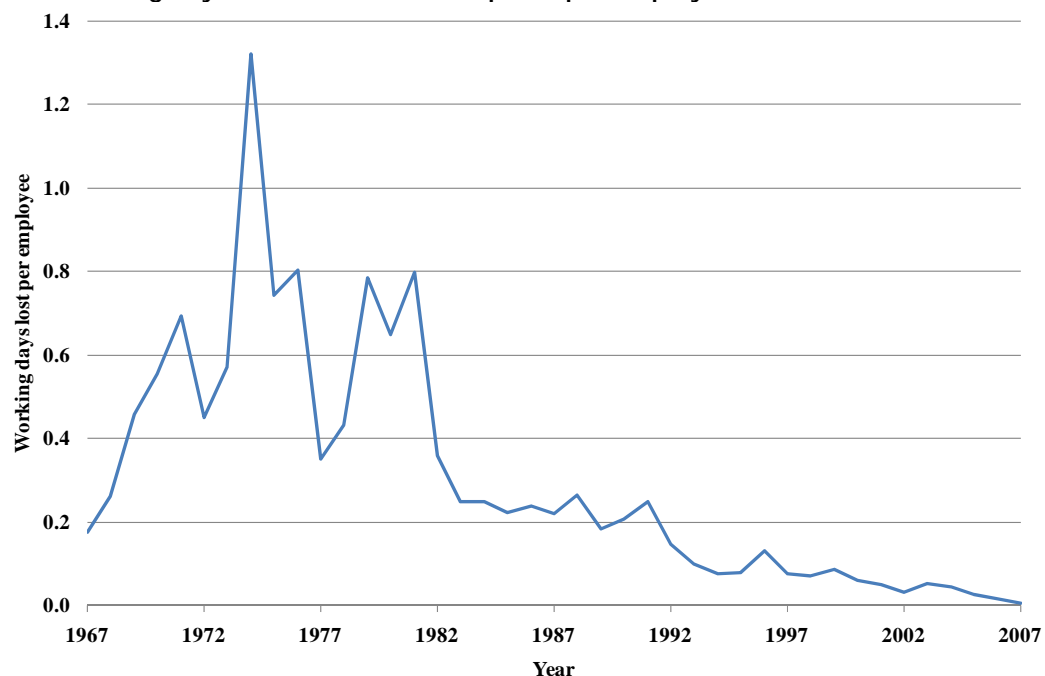
Source: B. Dabscheck, 'The arbitration system since 1967', in S. Bell and B. Head (eds.), *State, Economy and Public Policy*, Oxford University Press, Melbourne, 1994; and ABS, *Industrial Disputes, Australia*, electronic delivery, ABS Cat. No. 6321.0.55.001.

Figure B3: Number of employees involved in industrial disputes ('000), Australia, 1967 to 2007



Source: B. Dabscheck, 'The arbitration system since 1967', in S. Bell and B. Head (eds.), *State, Economy and Public Policy*, Oxford University Press, Melbourne, 1994; and ABS, *Industrial Disputes, Australia*, electronic delivery, ABS Cat. No. 6321.0.55.001.

Figure B4: Working days lost to industrial disputes per employee, Australia, 1967 to 2007



Source: B. Dabscheck, 'The arbitration system since 1967', in S. Bell and B. Head (eds.), *State, Economy and Public Policy*, Oxford University Press, Melbourne, 1994; and ABS, *Industrial Disputes, Australia*, electronic delivery, ABS Cat. No. 6321.0.55.001.

Appendix C: A note on secret ballots in the United Kingdom

When supporting the introduction of secret ballot arrangements, the Howard Government noted that secret ballots, which had been operating in the UK since 1984, had been retained by the Blair Government's Employment Relations Act 1999 and had the support of trade union leaders.¹⁵⁴

Background

The requirement for secret ballots was introduced by the Thatcher Conservative Government through the Trade Union Act 1984. 1993 amendments to that legislation made postal ballots compulsory. Under the legislation, procedural requirements were stringent and employers were frequently successful in having ballot results overturned for minor infringements (see further below). When a ballot was overturned, the union was required to restart the ballot process. Under the legislation, unions were liable for unauthorised or unofficial industrial action, unless they could prove that they had taken all reasonable steps to prevent such action.

The Blair Government's Employment Relations Act 1999 retained provision for secret ballots, but required that an honest procedural mistake needed to be significant enough to potentially change the result of the ballot before it could be used to overturn the result. The Blair Government retained provision for union liability for unauthorised or unofficial industrial action. However, it passed procedural amendments which made it easier for union officials to establish that they had attempted to prevent unauthorised industrial action.

Current ballot arrangements¹⁵⁵

In the UK, there is no legal protection for union members taking industrial action **unless** any agreed procedures have been completed, all other means of resolving the dispute have been considered and it has been authorised by a secret ballot. By law, unions in the UK must give employers at least seven days' notice of a ballot, stating that the union intends to hold a ballot, the date which the union reasonably believes the ballot will be held and any other information the union has which would assist the employer to make plans. The union must also give the employer a sample voting paper at least three days before the ballot. Ballots can be carried by a simple majority of valid votes cast. If workers vote in favour of industrial action, the action must **begin** within four weeks of the ballot. This period may be extended to up to eight weeks after the ballot, but only if both the union and employer agree. In some circumstances the union may also apply to the court for an extension.

154. For example, Abbott, Second reading speech, op. cit.

155. Unless otherwise indicated, information in this section is sourced from: Department of Trade and Industry, *Code of Practice: Industrial action ballots and notice to employers*, first published September 2005, www.dti.gov.uk/, accessed 20 May 2008; 'Directgov: Employees industrial action', www.direct.gov.uk/en/Employment/Employees/TradeUnions/DG_10031235, accessed 20 May 2008; and Department for Business Enterprise and Regulatory Reform, 'Industrial action and the law—Guidance', www.berr.gov.uk/employment/employment-legislation/employment-guidance/ page17758.html, accessed 20 May 2008.

Comparisons

Key differences between the UK and Australian arrangements are as follows. In the UK:

- The union is not required to apply to a tribunal before it can initiate a ballot. The union itself can determine that a ballot should be conducted.
- There is no tribunal oversight of the ballot. The union must provide notice to the employer(s), but it is responsible for making sure that the ballot is conducted in accordance with the legislation and the associated Code of Practice.
- The union is required to appoint a qualified person as the scrutineer of the ballot where more than 50 members have an entitlement to vote, but is not required to use a scrutineer where 50 or fewer members are entitled to vote. In the latter case, the union itself may conduct the ballot and is required to ensure that the votes are fairly and accurately counted.
- The union must ensure that the scrutineer carries out the functions required to be part of his/her terms of appointment and that there is no interference with this function from the union. The scrutineer must also satisfy themselves that what is done conforms to legal requirements.
- The validity of the ballot is not affected if the union subsequently ‘induces’ members to take part in, or continue with industrial action
 - who were not members at the time of the ballot or
 - who were members, but it was not reasonable for the union to expect (at the time of the ballot) that they would be called upon to take action (for example, because they changed jobs after the ballot).
- It is possible for a union to hold a single ballot for more than one workplace, provided that
 - at each of the workplaces covered by the single ballot there is at least one member of the union affected by the dispute or
 - entitlement to vote in the single ballot is given, and limited, to all of a union’s members who are employed in a particular occupation or occupations by the employer or any of a number of employers with whom the union is in dispute or
 - entitlement to vote in the single ballot is given, and limited, to all of a union’s members who are employed by a particular employer or any of a number of employers with whom the union is in dispute.
- Where a single ballot across a number of workplaces is held and the majority is in favour of industrial action, it is lawful for the union to organise industrial action at any such workplace. This means that ballots and legally protected industrial action may be taken in relation to multi-employer bargaining. In the case of a multi-employer ballot, industrial action can only be taken at workplaces where a majority supported industrial action.

- Unions meet all the costs of conducting ballots, but have greater control over the ballot process and the scope of protected action than Australian unions. A ballot refund scheme initially established in the UK to recompense unions for the cost of conducting ballots was phased out between 1993 and 1996.
- Individual employees who participate in industrial action may face action for breach of contract and can be dismissed. However, employees dismissed within eight weeks of the commencement of legally protected industrial action can claim unfair dismissal.

Other aspects of the UK arrangements have similarities with Australian arrangements; in particular, the statutory immunity for industrial action only applies where:

- there is a ‘trade dispute’—that is, a dispute between workers and their own employer which is wholly or mainly about employment-related matters
- the action is not secondary action (unless the action involves peaceful picketing at the picket’s own place of work, which is allowed under UK law)¹⁵⁶
- the action does not involve unlawful picketing
- the action is not intended to promote union closed shop practices, or to prevent employers using non-union firms as suppliers
- the action is not in support of any employee dismissed while taking unofficial industrial action.

Assessments

Researchers have found that successful ballots in the UK have had the effect of improving the bargaining position of, and strategies available to unions. This is because ballots can demonstrate the commitment of the union membership to the proposed industrial action and provide legitimacy to industrial action (both in the minds of union members and members of the public).¹⁵⁷ Studies have shown that participation in ballots and the proportion of ballots returning ‘yes’ votes has generally been high. However, most ballots are not followed by industrial action. Often, strike action is unnecessary, because a successful ballot clearly indicates to the employer the level of support for industrial action.¹⁵⁸ Detailed procedural

156. In the UK, the Trade Union and Labour Relations (Consolidation) Act 1992 gives protection under civil law for picketers acting in connection with an industrial dispute at or near their workplace who are picketing peacefully to obtain or communicate information or peacefully persuading any person to work or abstain from working.

157. H. Collins, K. Ewing and A. McColgan, *Labour Law Text and Materials*, Hart Publishing, Oxford, 2001, p. 924 quoted in McCrystal, ‘Shifting the Balance’, op. cit., p. 204; S. Dunn and D. Metcalf, ‘Trade union law since 1979’ in I. Beardwell (ed.), *Contemporary industrial relations: a critical analysis*, Oxford University Press, USA, 1993; R. Martin, P. Fosh, H. Morris, P. Smith and R. Undy, ‘The decollectivisation of trade unions’ ballots and collective bargaining in the 1980s’, *Industrial Relations Journal*, 22 (3), 1991, p. 205; S. Kessler and F. Bayliss, *Contemporary British Industrial Relations*, 3rd ed., Macmillan, London, 1998, pp. 254–258.

158. *Pre-industrial action secret ballots*, op. cit., pp. 17–22.

requirements provided an avenue for employers to challenge the legality of industrial action on the basis of faulty procedures, particularly in the years prior to the Blair Government's amendments. Unions criticised the scope for employers to mount legal challenges on matters of marginal detail.¹⁵⁹ In some cases, commentators observed that such action by employers made the resolution of the dispute more difficult.¹⁶⁰

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159. See Kessler and Bayliss, op. cit., p. 258.

160. *ibid.*, p. 20.